84-769

No.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ALBERT JOHN FERN, JR. and
ROBERT LEWIS STIRM, PETITIONERS

v.

JOAN TURMAN, JOHN O. MARSH,
SECRETARY OF THE ARMY, LORETTA F.ADAMS
AND VERNE ORR, SECRETARY OF THE AIR FORCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Does a federal district court have discretionary authority to reject jurisdiction in a diversity case on grounds of the marital exception to federal jurisdiction where important issues implicating substantial federal interests are involved and the traditional elements of the marital exception -- alimony, child custody or status of the parties -- are not present?

(2) Must a district court exercise its federal question jurisdiction in a suit by a retired military officer seeking entitlement to retired pay, where the former spouse defends upon res judicata grounds based upon a prior state court judgment which issued without subject matter jurisdiction?

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Albert John Fern Jr. and Robert Lewis Stirm, retired military officers, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 10, 1984, which affirmed an order and judgment of the District Court for the Northern District of California dismissing sua sponte a complaint brought by petitioner Fern against Joan Turman, his former spouse, and against the Secretary of the Army, and affirmed a separate order by the district court in an unrelated case dismissing a complaint brought by petitioner Stirm against Loretta F. Adams, his former spouse, and the Secretary of the Air Force.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 736 F.2d 1367 and is set forth in Appendix B, infra. The order of the District Court dismissing the complaint in Fern v. Turman, et ano., D.C. No. CV 82-4821 (henceforth, the "Fern case"), for lack of jurisdiction, is not reported and is reproduced in Appendix C. The order of the District Court dismissing the complaint in Stirm v. Adams, et ano., D.C. No. CV 82-0749 (henceforth, the "Stirm case"), is also not reported and is reproduced in Appendix D.

JURISDICTION OF THIS COURT TO ENTERTAIN THE PETITION

The judgment of the Court of Appeals was entered on July 10, 1984. A timely request for an extension of time within which to file an application for Writ of Certiorari was filed and this Court entered an order dated October 1, 1984, extending

the time within which the application may be filed to and including November 8, 1984. A copy of that Order is set forth in Appendix F. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL JURISDICTION BEFORE THE DISTRICT COURT

In the Fern case, jurisdiction was invoked under 28 U.S.C. §§ 1331(a), 1332(b) and 1361. In the Stirm case, jurisdiction was invoked under 28 U.S.C. §§ 1331(a) and 1361.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case primarily involves the grant of diversity jurisdiction to district courts, 28 U.S.C. § 1332(a); federal question jurisdiction, 28 U.S.C. § 1331(a); and jurisdiction to compel performance of his duties by an officer of the United States, 28 U.S.C. § 1361.

Because this Petition is concerned only with whether the court below incorrectly decided the jurisdictional questions, the Petition does not raise questions on the merits of the dispute concerning Petitioners' entitlement to substantive relief. Nevertheless, for an understanding of the dispute on the merits, it is necessary to set out statutory and constitutional provisions describing Petitioners' claims. In this Petition, reference is therefore made to the following statutes:

Title 10 U.S.C. §§ 688(a); 1408(c)(1) and (3); 3929; 7721(a); and 8929

Title 37 U.S.C. § 701(a)

Title 28 U.S.C. §§ 1442a; 1447(d)

Except as set forth in the text, these statutes, along with Art. III, Sec. 2, Cl. 1, and the Due Process and Just Compensation clauses of Amendment V of the United States Constitution, are reproduced in pertinent part in Appendix A.

STATEMENT OF FACTS

A. PROCEDURAL HISTORY

Petitioner Robert Lewis Stirm, a highly decorated Air Force officer, returned from five and one-half years in a North Vietnamese prisoner-of-war camp, injured, to a divorce proceeding in which his wife claimed and secured from the Superior Court, San Mateo County, California, 42.7% of his military retired pay. The duration of his incarceration in North Viethan was included in the calculation of his wife's entitlement. The interlocutory and final decrees were entered in 1974. The jurisdiction of the divorce court to enter an order dividing military retired pay was not challenged. The decree did not award the ex-spouse spousal support, and she immediately remarried.

This Court decided McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 in June 1981. It there determined that federal law required that military retired

pay actually reach the retired officer in its entirety and that federal law which mandated this result preempted a conflicting application of California's community property regime which resulted in an ex-spouse taking part of the retirement pay. After McCarty, Stirm ceased making payments of retired pay to the ex-spouse. On February 1, 1982, the ex-spouse brought an action to enforce the dissolution decree in the family law court which Stirm removed to the district court under 28 U.S.C. § 1442a. [1] At the same time, Stirm filed an

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[1] That section provides in pertinent part:

> A civil or criminal prosecution in the court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title or authority under a law of the United States respecting the armed forces thereof, . . . may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States for the district where it is pending in the manner prescribed by law,...

original action against the ex-spouse and against the Secretary of the Air Force.

As against the ex-spouse, Stirm claimed an entitlement to the entirety of his military retired pay and asserted that the 1974 divorce decree had issued without subject matter jurisdiction, insofar as it purported to dispose of his retired pay under California's community property scheme and not under federal law. Stirm grounded his entitlement to the entirety of his retired pay under the same provisions which the McCarty court had found sufficient to confirm the military officer's entitlement to the entirety of his retired pay (among others, these sections were 10 U.S.C. §§ 3929, 7721(a); and 37 U.S.C. 701(a)).

As against the Secretary, Stirm sought a determination that if he were to be deprived of a significant portion of his retired pay, he should not remain subject to

restrictions set out in the Code of Military Justice, 10 U.S.C. § 802(4); to court martial, and to recall to active service at the discretion of the Secretary, 10 U.S.C. § 688(a). Since retired pay represents reduced pay for reduced but continuing services rendered to the military by the officer, Stirm argued it would be inequitable and a violation of due process to apply the Code of Military Justice and to subject him to recall while redirecting his pay to another. Before the Secretary made any appearance in the case, the ex-spouse moved to remand the cause which Stirm had removed and to dismiss Stirm's original complaint filed in the district court.

By Order dated September 3, 1982, District Court Judge Spencer Williams determined that the removal of the enforcement action had been improvident and remanded the action to the family law court. He also concluded that Stirm's own claim did not "arise" under federal law; it was instead a

defense based upon federal law to the ex-spouse's state claim to enforce the 1974 divorce decree. With respect specifically to 28 U.S.C. § 1442a, Judge Williams found no "act" done under color of Stirm's office; the court held that the dispute "in no way involves the armed forces but rather a private dissolution proceeding between two parties." See Appendix D, p.8. 2/

2/ Stirm's argument before the District Court, not reflected in its opinion, was that § 1442a is an extraordinary provision which allows removal even if only the defense is based upon a federal issue encompassed by the statute. Stirm contended that his defense was contemplated by the statute since he claimed a "right" to retired pay by virtue of his "office" and "status" as a retired officer subject to court martial and to recall to active service. He argued that the statute is remedial and shows a concern that federal officers have access to a federal forum when rights which they assert associated with their military service are challenged under conflicting state law provisions.

The determination by Judge Williams that removal was improvident is not directly appealable (28 U.S.C. § 1447(d)), and is not part of the questions presented in this petition.

Judge Williams noted the discretionary nature of a request for declaratory relief and adverted to the marital exception in dismissing Stirm's complaint. ("Of course, federal courts traditionally have refrained from exercising jurisdiction over cases which in essence are domestic relations disputes." (Appendix D, p.9, f.n.3.) Stirm's appeal from the dismissal of his complaint was consolidated for briefing and argument with the appeal in Fern.

Petitioner Albert John Fern, Jr. had served on active duty with the Army for 28 years when the family court in Monterey County issued its interlocutory divorce decree in 1978 awarding the ex-spouse 45% of his Army retired pay. Fern had indicated to the family court that he wished to remain in active service until he could complete 30 years in order to secure a higher level of retired pay. However, the divorce decree

provided that if Fern (although then eligible) chose not to retire immediately from active service, he must nevertheless pay the allocable portion of his retired pay to his ex-spouse from his active duty pay.[3/]

After the divorce, Fern continued in active service for one year, paying the ex-spouse her allocable portion of his retired pay out of his current pay. However, he could not make ends meet with so little current pay remaining; compelled by the divorce decree's requirement, Fern retired during his twenty-ninth year of service in

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3/ Under California law, community property principles and the division of retirement funds are deemed paramount to other interests: the spouse of a worker eligible for retirement may insist that she be paid her share of retirement benefits promptly; the working spouse may not compel the ex-pouse to defer receipt of his retirement benefits by continuing to work. This rule has been applied to military retired pay. Gillmore v. Gillmore, 113 Cal.App.3d 319, 169 Cal.Rptr. 811 (1980); In re Marriage of Luciano, 104 Cal.App.3d, 164 Cal.Rptr. 93 (1980); In re Marriage of Scott, 156 Cal.App.3d 251, 202 Cal.Rptr. 716 (1984).

1979 and began receiving retired pay. Following the decision in McCarty, supra, Fern ceased making payments to the ex-spouse.

On April 16, 1983 the ex-spouse brought an enforcement action in the family court, which Fern removed to the Northern District of California. He also filed an original action on September 9, 1982 against the ex-spouse and against the Secretary of the Army. Jurisdiction against the ex-spouse was predicated on diversity of citizenship, since the ex-spouse had remarried after the divorce and settled in Texas. In his complaint, Fern stated that he was entitled to the entirety of his retired pay. He collaterally attacked the 1978 divorce court judgment as lacking subject matter jurisdiction to dispose of 45% of his retired pay.

Fern separately challenged the authority of the divorce court to order him to pay his ex-spouse 45% of his retired pay out

of his active duty pay. He sought recoupment of sums which he had paid to the ex-spouse prior to retirement from active service. As against the Secretary, Fern asked for the same relief as had Stirm.

By Order entered on September 15, 1982, District Court Judge William A. Ingram remanded the ex-spouse's enforcement action to the Superior Court (Appendix E). Judge Ingram stated that removal was improper under either the diversity or federal questions statutes. He found no federal question, and stated that "cases involving domestic relations are exempted from the jurisdictional grant predicated upon diversity of citizenship."

By order entered on September 22, 1982, District Court Judge William W. Schwarzer dismissed Fern's federal complaint with a quote from Ex parte Burrus, 136 U.S. 586, 593-94, 10 S.Ct. 850, 853, 34 L.Ed. 500, 503 (1890), that "the whole subject of the domestic relations of husband and

wife ... belongs to the laws of the states, not to the laws of the United States." He dismissed the complaint for lack of subject matter jurisdiction based upon the marital exception in diversity cases and denied leave to amend to assert federal question jurisdiction on the ground that the federal matter in the complaint only anticipates a federal defense and is not adequate to support the claim as one arising under federal law. On September 28, 1982 Fern appealed the court's dismissal and his appeal was consolidated with the Stirm case.

The Ninth Circuit affirmed both dismissal orders of the District Court on the basis of the proper exercise by both district judges of discretion to apply the marital exception. The "issues involved are closely related to the issues within the domestic relations exception and considerations of comity and policy counsel against federal court intervention."

(Appendix B, p.5) Although the divorces had become final many years ago, both ex-spouses had remarried, and no issue had been raised concerning spousal or child support, the Appeals Court nevertheless felt that if in the application of federal law the retired pay divisions were invalidated, "[s]uch a decision would likely require the state courts to determine whether compensating alterations in the decree, such as the addition or alteration of support terms, are necessary." (Appendix B, p.6.) By applying the marital exception, the lower federal courts would avoid the "duplicative and piecemeal litigation, and the resulting potential [for] inconsistent state and federal decrees." (Id.)

The lower court also rejected the officers' contentions that their claims arise under federal law because their rights to military retired pay are determined by federal statute. Instead, the court considered the officers' claims to be merely

defenses to the state claims of the ex-spouses. With respect to the officers' claims against the Secretaries of the Army and the Air Force, the court concluded that the issues were not ripe for judicial decision. Until the state court proceedings have been concluded and each Secretary had actually recalled the officer to active service, the claims against the Secretaries were merely "contingent," "not yet final" and lacked a "threat of significant and immediate impact." (Appendix B, p.4.)

B. ARGUMENTS PRESENTED TO THE LOWER COURT ON THE MERITS OF THE SUBSTANTIVE DISPUTE.

The military officers' arguments to the Ninth Circuit on the merits of the disputes are neither frivolous or insubstantial. Although not included within the questions presented for the grant of the writ, the arguments on the merits provide helpful background to the consideration of the jurisdictional issue. If this Court grants

the Writ and petitioners prevail in the Court's plenary consideration of the jurisdictional issues, petitioners' claims are likely to prevail on the merits of the dispute in a subsequent lower court review of their claims.

Petitioners claimed below that they were entitled to a determination by a federal court that the Congress had safeguarded military retired pay to the serviceman as his personal entitlement free from claim to division under state law by an ex-spouse. The statutory bases for this exclusive entitlement are in 10 U.S.C. §§ 701(c), 3929, and in 37 U.S.C. § 701. This Court in McCarty v. McCarty, supra, determined that these statutes require such a result and supplant state law.

The officers argued that although res judicata is an affirmative defense which mandates repose, that doctrine cannot avail the ex-spouses because the 1974 and 1978

dissolution judgments were void, of no affect, and could not be enforced. In a collateral attack based upon federal legislation paramount to conflicting state law, a prior state court judgment raised in defense can be successfully resisted.[4/] A court that applies preempted state law has acted

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4/ See, e.g., Ridgway v. Ridgway, 454 U.S. 46, 102 S.Ct. 49, 102 S.Ct. 49, 70 L.Ed. 2d 39 (1981) (divorce court judgment applying state law invalidated by preempting federal law); United States v. Pink, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942) (state court judgment applying state law in conflict with exercise by President of foreign relations power); Kalb v. Feuerstein, 308 U.S. 433, 60 S.Ct. 343, 80 L.Ed. 370 (1940) (state court judgment applying state law interferes with operation of bankruptcy laws); United States v. City of New Haven, 447 F.2d 972 (2d Cir. 1971) (state court judgment applying state law to regulate air space invalidated by pervasive federal law); United States v. City of New Haven, 496 F.2d 452 (2d Cir. 1974), appeal dismissed, cert. den. 419 U.S. 958 (1975) (same); Hoffman v. United States, 391 F.2d 195 (9th Cir. 1968) (divorce court judgment invalidated in federal court). Cf. Carpenters' Pension Trust, etc. v. Kronschnabel, 460 F.Supp. 978 (C.D. Cal. 1978), aff'd 632 F.2d 745 (9th Cir. 1980), cert. denied, 453 U.S. 922 (1981) (collateral attack on divorce decree, but no preemption found).

without subject matter jurisdiction.[5] Federal preemption cases represent, upon compelling public policy grounds, one of the rare exceptions to doctrines based upon the

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[5] See, United States v. Tarble, 80 U.S. 397, 402, 20 L.Ed 597, 598 (1872) ("question presented may be more generally stated ... whether any judical officer of a state has jurisdiction"); Painters' Local Union No. 567 v. Tom Joyce Floors, Inc., 398 P.2d 245 (Nev. App. 1965) ("preemption ... deprives a state of jurisdiction over matters embraced by a congressional act regardless of whether the state law coincides with, is complimentary to, or opposes the federal Congressional expression.") In a collateral attack on a state court judgment which gives effect to preempted state law, the district court must declare "that the Superior Court has attempted in its order to assert dominion over an asset which the United States Congress has put beyond its reach." Hoffman v. United States, 391 F.2d 195, 196 (9th Cir. 1968). Application of the preempted and, hence, invalid state law is "unconstitutional, illegal and void." Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667, 676 (9th Cir. 1972). The state law is "void," a "nullity." Kalb v. Feuerstein, 308 U.S. 433, 438-39, 60 S.Ct. 343, 346, 80 L.Ed. 370 (1940); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512, 60 S.Ct. 653, 656, 84 L.Ed 894 (1940); Carpenters' Pension Trust, etc. v. Kronschabel, 460 F.Supp. 978, 980 (C.D. Cal. 1978), aff'd. 632 F.2d 45 (9th Cir. 1980), cert. den., 453 U.S. 922 (1981).

finality of judgments.[6/]

If the state court judgments are invalid due to purely jurisdictional considerations, no question arises concerning the retroactive application of McCarty. It was not the Supreme Court which in McCarty preempted state law; that had long ago -- in the beginning of relevant time -- been done by the Congress. The McCarty court only stated that which had existed all along, but

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6/ United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 514-15, 60 S.Ct. 653, 657, 84 L.Ed. 894 (1940) (there are "areas, including lack of jurisdiction, in which competing policies to that of repose, justify collateral attack"); United States v. Hellard, 322 U.S. 363 64 S.Ct. 985, 88 L.Ed 1326 (1943) (prior state court judgment void because of overriding federal interests in safeguarding Indian-owned land); Durfee v. Duke, 375 U.S. 106, 114, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963) ("[d]octrines of federal premption ... may in some contexts be controlling" as against res judicata). See, Note, "Subject Matter Jurisdiction", 66 Cornell L.Rev. 534, 541-543 (1981) ("special exception to the modern finality approach for subject matter jurisdiction when the collateral attack would serve an important policy extrinsic to the judicial system.")

which had been ignored by the state divorce courts when they divided military retired pay. In any event, however, "by definition, a jurisdictional ruling may never be made prospective only." Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981). See, Holzsager v. Valley Hospital, 446 F.2d 792, 798 (2d Cir. 1981) (concurring opinion).

After the military officers appealed to the Court of Appeals, the Former Spouses' Protection Act, 10 U.S.C. § 1408, Public Law No. 97-252 (hereinafter "FSPA") entered on February 1, 1983 into force. That new provision states in subsection (c)(1) that a state court "may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." However, Subsection (c)(3) states that the new legislation "does not

authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section."

Before the Ninth Circuit, the retired officers confronted the new legislation for the first time, arguing that it is the law in effect at the time of the appeal which governs the disposition of the case. Bradley v. School Board, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). The officers contended that if their retired pay had been fully earned as of the date of their retirement, the Congress could not, under the Just Compensation clause of the Fifth Amendment, divest them of their retired pay, without compensation. United States v. Larionoff, 431 U.S. 864, 879, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977) (retroactive application of legislation eliminating bonuses for military personnel would raise serious Fifth Amendment difficulties); Costello v. United States,

587 F.2d 424, 427 (9th Cir. 1978), cert. den. 442 U.S. 929 (1979) (court would "proceed on the assumption, arguendo, that if retirement pay [for military personnel] had been fully earned at the date of retirement it could not be divested without compensation"). Cf., United States v. Security Industrial Bank, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982) (governmental action that would retroactively result in benefitting debtors in bankruptcy by impairing property interests of creditors holding secured liens constitutes a Fifth Amendment taking).

When the Congress in the FSPA changed the rules after the military officers had completed more than 20 years service under the old rules, a Fifth Amendment taking occurred: the new rules operate to deprive the officers of that property which was theirs as having already been fully earned. The taking of property from one and transferring it to another without

compensation is an uncompensated taking. Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 357, 55 S.Ct. 758, 79 L.Ed 1468 (1935); Shelter Framing Corp. v. Pension Benefit Guarantee Corp., 705 F.2d 1502 (9th Cir. 1983).

It is not necessary that the government acquire for itself the property in question; governmental action in shifting a portion of an officer's retired pay to his ex-spouse is as much an impermissible taking as if the funds had first gone to the U.S. Treasury and had then immediately been routed by the government to the ex-spouse. See, United States v. Security Industrial Bank, supra.

The military officers seek a federal forum because the California state courts have been uniformly hostile to the analysis and result reached in McCarty. In its first post-McCarty opinion, the California Court of Appeal criticized the McCarty majority and extolled the dissent. In re Marriage of Jacanin, 124 Cal.App.3d 67, 70, 177

Cal.Rptr. 86, 87 (1981). Since then the state appeals court has refused to apply the reasoning in McCarty to a case in which the parties had entered into an agreement which included a division of retired pay, In re Marriage of Sheldon, 124 Cal.App.3d 371, 177 Cal.Rptr. 380 (1981); or to a case in which the trial court had already rendered a decision against the military officers, but the decision was on appeal at the time of the McCarty decision, In re Marriage of Mahone, 123 Cal.App.3d 17, 176 Cal.Rptr.274 (1981).

With respect to divorce court allocations of military retired pay which were final at the time McCarty was announced, the state appeals court has not applied the test set out in Firestone Tire & Rubber Company v. Risjord, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981) for retroactive application of a Supreme Court decision finding lack of jurisdiction. Instead, the state court has carefully

employed Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) as its authority for a non-retroactivity determination. See, e.g., In re Marriage of Sheldon, supra. The Chevron test, however, clearly applies only to a change in substantive rules of law and not to determinations relating to lack of jurisdiction. Holzsager v. Valley Hospital, 446 F.2d 792, 798 (2d Cir. 1981) (concurring opinion).

When the FSPA entered into force, the state appellate court at its earliest opportunity determined that the statute was valid as against a due process challenge. It came to this conclusion in a case in which neither party had raised a constitutional question (and when invited by the court to address the constitutional issues refused to do so). In re Marriage of Ankenman, 142 Cal.App.3d 833, 838, 191 Cal.Rptr. 292, 294 (1983).

The State Appellate Court has recently determined that notwithstanding the limita-

tion in the FSPA at § 1408(c)(3), that a state court not direct an officer to retire from the military, the state courts are free to demand that the retired officer begin making payments of retired pay while on active duty if he prefers not to retire. The determination was made in the face of the language and the history of the new statutory provisions. In re Marriage of Scott, 156 Cal.App.3d 251, 202 Cal.Rptr. 716 (1984).

Indeed, the state divorce courts have recently begun invalidating prior final divorce court judgments rendered after McCarty and before the FSPA entered into force; they have refused to apply res judicata principles to their own final decrees when such decrees benefitted the military officers. E.g., in In re Marriage of Southwick (San Francisco Superior Court No. 759565), a final judgment of dissolution entered on April 8, 1982 that had confirmed to the husand sole entitlement to his

military retired pay pursuant to McCarty, was modified by order entered on October 3, 1984 so as to award the ex-spouse a portion of the military retired pay.

Moreover, a divorce court has just recently overturned the McCarty decision itself in an order involving the very same parties, Dr. Richard John McCarty and his ex-spouse. The San Francisco Superior Court, No. 715268, held that the Supreme Court decision in McCarty is no bar to granting Mrs. McCarty the very same benefits that the earlier opinion of the Supreme Court had denied her.

In the Superior Court proceedings in Fern and Stirm following remand, the family courts in each case made short shrift of the officers' claims to federal entitlements and granted the ex-spouses enforcement of their claims. The state determinations are now on appeal where the result appears to be pre-ordained. The family court decisions, because not yet final, have no res judicata

effect under California law. Morris v. McCauley's Quality Transmission Service, 60 Cal.App.3d 964, 132 Cal.Rptr. 37 (1976).

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS AS TO THE SCOPE TO BE GIVEN TO THE MARITAL EXCEPTION TO THE EXERCISE OF FEDERAL JURISDICTION.

1. The decision below conflicts with decisions in other circuit courts which have considered whether federal judges have discretion to reject jurisdiction by invoking the marital exception where the relief requested does not concern the traditional core elements of the exception -- divorce, custody or support. The decision below reflects the maximalist position of the Ninth Circuit which gives broad scope to the exception. Courts in the Ninth Circuit dismiss "almost any case involving married couples or their children." 7/ The Third Circuit, like the

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7/ "Federal Jurisdiction and the Domestic Relations Exception: The Search For Parameters", 31 U.C.L.A. L.Rev. 843, 860 (henceforth "Federal Juris-diction"). See, e.g., Armstrong v. Armstrong, 696 F.2d 1237 (9th Cir. 1983) (exception applies to claim by military retired officer for determination

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Ninth Circuit, also applies the marital exception broadly. 8/

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of entitlement to military retired pay); Peterson v. Babbitt, 708 F.2d 465 (9th Cir. 1983) (per curiam) (exception applies in action by father in state prison against state authorities for denial of visitation rights with minor children); Csibi v. Fustos, 670 F.2d 134 (9th Cir. 1982) (exception applies in diversity action by decedent's first wife and children to establish rights in decedent's estate); L. H. v. Jamieson, 643 F.2d 1351 (9th Cir. 1981) (exception applies in class action on behalf of dependent, neglected, or delinquent children); Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968) (exception applies in diversity action to establish paternity and obtain child support). See also, Welker v. Metropolitan Life Ins., Co., 502 F.Supp. 268 (C.D. Cal. 1980) (exception applies in action by woman seeking to be declared putative wife of decedent); Bacon v. Bacon, 365 F.Supp. 1019 (D.Or. 1973) (exception applies in diversity action where ex-wife sought damages from former husband for intentional infliction of emotional anguish).

8/ See, e.g., Solomon v. Solomon, 516 F.2d 1018 (3rd Cir. 1975); Albanese v. Richter, 161 F.2d 688 (3rd Cir.), cert. den., 332 U.S. 782 (1947). See also Fusorro v. Fusoro, 550 F.Supp. 1260 (E.D. Pa. 1982); Lewis v. Lewis, 543 F.Supp. 35 (N.D. Pa. 1981); Robertson v. Robertson, 523 F.Supp. 96 (E.D. Pa. 1981); Allen v. Allen, 518 F.Supp. 1234 (E.D. Pa. 1981); Johanning v. Johanning, 509 F.Supp. 770 (D.N.J. 1981).

By contrast, the Fifth Circuit accords the marital exception a much narrower scope. 9/

Unlike the Ninth and Third Circuits, the Fifth Circuit has exercised jurisdiction in actions in which the plaintiff seeks alimony and child support in arrears; 10/ It also

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9/ See, e.g., Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981) (the exception held not to apply in a diversity action for past-due alimony and child support pursuant to a state decree); Erspan v. Badgett, 647 F.2d 550 (5th Cir. 1981), cert. den., 455 U.S. 945 (1982) (exception not applied in a diversity action to enforce terms of a divorce decree); Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978) (exception did not apply to a claim for damages caused by breach of a separation agreement). See, also, Wilson v. Wilson, 532 F.Supp. 152 (M.D. La. 1980), aff'd. 667 F.2d 497 (5th Cir. 1982) (exception did not apply in a diversity action to enforce out-of-state divorce decree); Lee v. Hunt, 431 F.Supp. 371 (W.D. La. 1977) (exception not applied in a diversity action seeking declaration of status as a putative wife in order to acquire rights in an estate).

10/ See, e.g., Jagiella v. Jagiella, 647 F.2d 561, 564 (5th Cir. 1981) ("since the arrearages here in question were calculable solely from the records of the Clerk of the Florida Circuit Court and involved no litigation of questions regarding the parties' marital relationship, we conclude that the district court properly exercised jurisdiction").

exercises jurisdiction in cases involving damages for breach of separation agreements.[11]

There is confusion and conflict among the other circuits as well. The First, Second, and Sixth Circuits give a broad construction to the exception in the diversity area, [12] the Fourth, Seventh, Eighth and D.C. Circuits construe the

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[11] See, e.g., Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978) ("while we approvingly acknowledge the so-called domestic relations exception to diversity jurisdiction, we find it inapplicable to the instant case, which involves little more than a private contract to pay money between persons long since divorced, whose children are well into adulthood").

[12] See, e.g., Armstrong v. Armstrong, 508 F.2d 348 (1st Cir. 1974); Kamhi v. Cohen, 512 F.2d 1051 (2d Cir. 1975); Firestone v. Cleveland Trust Co., 654 F.2d 1212 (6th Cir. 1981); Gargallo v. Gargallo, 487 F.2d 914 (6th Cir. 1973) (per curiam).

exception more narrowly. [13] The circuits which restrict the scope of the exception focus upon whether the conflict involves an inquiry into mere property rights; if so, the domestic relations exception will not apply. The maximalists circuits which give broad scope to the exception hold that a

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[13] See, e.g., Kelser v. Anne Arundel County Dep't. of Social Servs., 679 F.2d 1092, 1095 (4th Cir. 1982) (court has jurisdiction to hear civil rights action with domestic relations backdrop); Wasserman v. Wasserman, 671 F.2d 832 (4th Cir.), cert. den., 103 S.Ct. 372 (1982) (exception would not apply in action to recover damages for child enticement, intentional infliction of emotional distress, and conspiracy relating to removal of children from custodial parent by other parent); Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980) (exception not applicable to tort claims between former spouses); Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982) (tort actions between former spouses); Ruffalo ex rel Ruffalo v. Civiletti, 702 F.2d 710, 717 (8th Cir. 1983) (exception no bar to granting an injunction to compel return of a child by non-custodial parent in accordance with state custody decree); Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982) (domestic suits which sound in tort or contract and which do not exceed the federal court's competence should be heard).

determination of spousal status is itself a primary issue in the case and justifies dismissal of an action for lack of subject matter jurisdiction under the exception. 14/

2. The decisions below extend the marital exception to the federal question context. (Appendix B, p.5; Appendix D, p.9, f.n.3). However, the Fifth Circuit in Franks v. Smith, 717 F.2d 183, 185 (5th Cir. 1983), after careful consideration refrained from applying the exception outside the diversity context. 15/

Like the Ninth Circuit, the Sixth Circuit refuses to entertain a federal question suit which involves domestic

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14/ The cases are collected and analyzed in Comment, "Federal Jurisdiction" 31 U.C.L.A. L.Rev. 843, 855-865 (1984).

15/ See also, Rowell v. Oesterle, 626 F.2d 437, 438 (5th Cir. 1980) (per curiam) ("this general rule [i.e., the marital exception], however, has not operated to bar federal review of constitutional issues, simply because those issues arise in 'domestic contexts.'").

matters. [16] However, the Fourth Circuit disagrees and has held that a civil rights action in an interfamilial context is outside the domestic relations exception. Kelser v. Anne Arundell County Dep't. of Social Servs., 679 F.2d 1092 (4th Cir. 1982).

3. The decision below directly conflicts with the decision in Erspann v. Badgett, 647 F.2d 550 (5th Cir. 1981), supplemental opinion, 659 F.2d 26 (1981), cert. den., 455 U.S. 945 (1982). In Erspann, a divorced wife brought suit in federal district court, invoking diversity jurisdiction, to enforce a Texas divorce decree which had awarded her an interest in her former husband's Army retired pay. The

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[16] Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981) ("Even when brought under the guise of a federal question action, a suit whose substances is domestic relations generally will not be entertained in federal court").

defendant military officer contended "that under the 'domestic relations' theory of federal abstention, the district court should have refused to assert jurisdiction in this case." 647 F.2d at 553. The Fifth Circuit refused to apply the marital exception, noting that the case "involves none of the concerns upon which the domestic relations exception rest." Id.

Erspann cannot be reconciled with the decision below. The cases are in direct conflict, because the Ninth Circuit, unlike the Fifth, proceeds from different premises concerning the scope and appropriateness of the marital exception. 17/

17/ In its supplemental opinion, the Erspann court reached the merits of the husband's claim that the decision in McCarty allowed him to defend against the wife's enforcement action. However, the husband offered no explanation why res judicata should not be accorded to the wife's prior divorce court award and the circuit court give no indication that it had before it any

(footnote continued)

Conflicting determinations by the various circuit courts concerning which family-background diversity and federal question cases may be considered by a federal court must be harmonized. Separate bodies of law concerning federal jurisdiction are developing with conflicting results, conflicting rationales, and the hopeless confusion of premises, technical concerns, and policy justifications. This Court should harmonize the inconsistent positions of the federal courts by granting the application for a Writ and then providing definitive guidelines in this troublesome area of federal jurisdiction.

II. THE ISSUES ARE IMPORTANT

1. The scope of the marital exception affects numerous litigants and covers a wide variety of situations. Although the exception is over 100 years old, this Court

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contention that the divorce court award was void for lack of subject matter jurisdiction.

has never offered guidelines to define its contours; never explained the conceptional underpinnings of the exception in light of the "all civil cases" language in §§ 1331(a) and 1332(a); and never explained just where the exercise of discretion to abstain shades off into an impermissible refusal to exercise jurisdiction.

The marital exception originated in 1858 in the dictum in Barber v. Barber, 62 U.S. (21 How.) 582, 16 L.Ed. 226 ("we disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or the allowance of alimony"); this dictum was enlarged in Ex parte Burrus, 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500 (1890). The exception was recognized in 1930 in Ohio ex rel Popovici v. Agler, 280 U.S. 379, 50 S.Ct. 154, 74 L.Ed. 489, where the Court stated that the federal courts had no jurisdiction over an action for divorce and alimony. Since 1930 the Court has not further dealt with the doctrinal matter.

However, since 1930, family law has developed in new ways that could not earlier have been foreseen. In the federal question area the determination of important constitutional questions arise in domestice settings, Franks v. Smith, 717 F.2d 183 (5th Cir. 1983) (exception rejected). Civil rights actions arise from domestic disputes. See, e.g., Zak v. Pilla, 698 F.2d 800 (6th Cir. 1982) (exception applied); Sutter v. Pitts, 639 F.2d 842 (1st Cir. 1981) (exception applied). Property interests associated with divorce have undergone radical changes both in community property states and in states that employ systems of equitable distribution in times of divorce. Moreover, the social agenda as its relates to the rights of spouses and ex-spouses against each other and against government officials has developed with great complexity. Causes of action not heard of in the time of the Barber dictum are now commonplace.

Federal Judges cannot turn a blind eye to changes in the social agenda affecting family law in the past 100 years and, as the Ninth, Third, and certain other circuits prefer to do, close their doors whenever the nastiness of an intrafamilial dispute threatens to disturb the decorum of the federal courthouse.

The dicta in the early opinions of this Court are not all-purpose brooms useful to sweep cases off congested calendars. The marital exception is too often used in perplexing fashion, used, as here, arbitrarily. The problem is too widespread to be ignored. 18/

2. There is no conceptual justification for expanding the marital exception beyond the areas of its core concerns. The historical derivation for the exception -- based upon the power of the

18/ See, cases collected in "Federal Jurisdiction" 31 UCLA L.Rev. 843-885 (1984).

English ecclesiastical courts [19]-- offers no convincing rationale as to why the exception should be continued and expanded into new areas beyond cases directly involving divorce and alimony. Some courts have doubted the validity of the historical explanation altogether. See, Ruffalo ex rel Ruffalo v. Civiletti, 702 F.2d 710, 717 (8th Cir. 1983); Lloyd v. Loeffler, 694 F.2d 489, 491-92 (7th Cir. 1982); Solomon v. Solomon, 516 F.2d 1018, 1030-33 (3d Cir. 1975) (dissent).

Moreover, the modern policy reasosns for the exception that domestic relations cases involve distasteful proof, require specialized attention or concern vexatious matters refer only to the core concerns associated with the exception and not to property disputes that arise in the context

[19] Barber v. Barber, 62 U.S. (21 How.) 582, 604-05, 16 L.Ed. 226 (1858) (Dissent); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 513 (2d Cir. 1973).

of a dispute between ex-spouses. Certainly these policy reasons do not explain why certain circuits seek to expand the application of the exception in widening arcs.

The present case is an excellent opportunity for this Court to resolve these important issues and to provide definitive guidance as to how far the exception extends.

III. THE DECISION BELOW IS ERRONEOUS

The marital exception should not have been invoked to deny either federal question or diversity jurisdiction. The District Court was not asked to grant a divorce; to determine alimony or support obligations; or to resolve the conflicting claims of divorced parents to custody of their children. The marital exception represents a simple expression of the more familiar doctrine of exclusive jurisdiction: state legislatures have granted family law courts exclusive jurisdiction over such matters as divorce and alimony. The power to grant a divorce, award custody or support lies exclusively in the state courts. The federal courts are powerless to act in these areas. However, under this familiar reasoning, there is no justification for expanding the marital exceptions beyond its core boundaries. Courts in the Fourth and Fifth Circuits (e.g., Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980); Franks v. Smith, 717

F.2d 183 (5th Cir. 1983) recognize the importance of not expanding the marital exception beyond its core elements.

The mere fact that a claim to federally-created statutory benefits rises in a domestic relations context should not bar consideration of the dispute by a federal court. An action involving a federal question which arises in a familial setting should be treated by federal courts in the same manner as all other federal question actions: if, in such a case, it is determined that the asserted federal statutory or constitutional claim is wholly insubstantial or frivolous or immaterial to the case (asserted solely for the purpose of obtaining federal jurisdiction) the action may be dismissed for lack of subject matter jurisdiction just as in any other case.

On the other hand, if the claimed violation is material to the case and is not technically insubstantial or frivolous, the claim should be determined by the federal

court. Cf. Franks v. Smith, 717 F.2d 183 (5th Cir. 1983).

If there is diversity jurisdiction, the court should determine whether it may grant the relief requested pursuant to the state law provision invoked by the complaining party. If state legislation has not reserved exclusive jurisdiction to the state courts to grant the specific relief requested, (i.e., to grant divorce, child custody or support), the federal court should proceed to exercise the jurisdiction granted to it by the Congress in implementation of Article III, Sec. 2, Cl.1 of the Constitution.

2. No policy considerations here justify the application of the exception. No California state law is here involved. The law invoked in each of the complaints is federal law. Family law courts have no special claim to expertise or experience superior to federal judges in considering the Constitutional or federal-law doctrines

pertaining to the merits of the dispute. Moreover, only property interests are here involved. The marriage has long ago terminated. There are no continuing incidents of alimony or child support. The mere fact that the issues arise within the context of a dispute between a military officer and former spouse is no reason to reject jurisdiction on policy grounds.

3. Federal courts may not expand the marital exception so as to keep their "federal hands off" (Kamhi v. Cohen, 512 F.2d 1051, 1056 (2d Cir. 1975)) the "vexatious" (Thrower v. Cox, 425 F.Supp. 570, 573 (D.S.C. 1976) "domestic relations imbroglio" (Overman v. United States, 563 F.2d 1287, 1292 (8th Cir. 1977).

Congress has declared that federal jurisdiction exists in "all civil cases" 28 U.S.C. §§ 1331(a), 1332(a), arising within the context of a federal question raised in the complaint or presented where diversity jurisdiction exists. Congress provided no

exception to the exercise of jurisdiction. In Article III of the Constitution it is "all cases at law or in equity" which are committed to the federal courts in federal-question and diversity contexts. Judge-made exceptions to these all-encompassing formulations must not "enervate" the force of these commands. See, Propper v. Clark, 337 U.S. 472, 490, 69 S.Ct. 1333, 98 L.Ed. 1480 (1949).

4. The doctrine of abstention does not here apply. Under Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 500-502, 61 S.Ct. 643, 85 L.Ed. 971 (1941), and its progeny, a federal court retains jurisdiction but abstains from ruling pending a determination by a state court that would resolve a state law question and perhaps make it unnecessary to decide a federal constitutional question.

The Ninth Circuit has stated that three criteria must be met for Pullman abstention to be applicable: (1) The complaint

"touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." (2) "The constitutional adjudication plainly can be avoided if a definitive ruling on this state issue would terminate the controversy." (3) The possibly determinative issue of state law is doubtful. Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838, 839-40 (9th Cir. 1979) (quoting Canton v. Spokane School Dist. No. 81, 498 F.2d 840, 845 (9th Cir. 1974)).

None of these criteria here apply. A collateral attack which challenges the power of the family court to have disposed of military retired pay in 1974 and 1978 does not touch a sensitive area of social policy. Cf. Hoffman v. United States, 391 F.2d 195 (9th Cir. 1968). The matter simply involves a garden-variety defense of res judicata based upon a decree which each petitioner contends was void for lack of

subject matter jurisdiction. As to the second element, there is no state issue upon which the state courts can rule which would terminate the controversy. The state court must rule on federal law.

Finally, there is no doubt as to how the state courts will rule in any matter touching upon McCarty. The California courts have indicated their preference with respect to post McCarty claims concerning military retired pay. They have always held against the retired military officer. See, e.g., In re Marriage of Cullen, 145 Cal.App.3d 424, 193 Cal.Rptr. 590 (1983); In re Marriage of Ankenman, 142 Cal.App.3d 833, 191 Cal.Rptr. 292 (1983); In re Marriage of Buikema, 139 Cal.App.3d 689, 188 Cal.Rptr. 856 (1983).

Another form of abstention, established in Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), seeks to avoid needless conflict with the state's administration of its own affairs. However,

Burford abstention only applies where there is a predominant state interest in carrying out its domestic policy. Although Burford-type abstention calls for dismissal of the action, there is no reason to apply such abstention when it cannot be said that the California legislature has sought to concentrate issues involving military retired pay and the relationship of the retired officer to the military in family courts.

It is ironic that the lower court would defer to the state courts given the notoriously unfriendly attitude of the state courts to any claim which challenges the state's community property scheme as conflicting with supervening federal law. (See, McCarty v. McCarty, supra, and prior decisions discussed therein arising in California and involving conflicts between community property concerns and federal law.)

The refusal by the courts below to entertain petitioners' claim is also insensitive to the Congressional concern of ensuring a federal forum to the military officer, even where the officer presents only a federal defense to a state complaint based upon state law. Although § 1442a is here not directly relevant, the solicitude expressed by the Congress in this rare instance of allowing a federal defense to suffice to confer the jurisdiction of the federal court should counsel federal courts not to rush to defeat the claims of military officers under discretionary or attentuated jurisdictional grounds.

5. The claims of the military officers here do arise under federal law and implicate important federal interests. The key element is that the earlier divorce decrees are a nullity. It is as if the officers were raising their claims for the first time and there had been no prior adjudication dividing their retired pay. In

that event it would have not been suggested that the officers' claims were only defenses to claims arising under state law. Here, there are no state claims, since the state courts prior to the FSPA could not dispose of military retired pay under state community property formulas.

6. The claims made by the military officers have been approved and validated by this Court in McCarty. The wife's res judicata claim is merely a matter in defense. See, Rule 8(c), Federal Rules of Civil Procedure. It is quite arbitrary for the lower court to insist that it is the enforcement action which is the main claim and the officers' claim under federal law which constitutes matter in defense. The officers were entitled to file their

original complaints directly invoking federal law. 20/

7. The claims of the military officers against the Secretary of each service, brought under §§ 1331(a) and 1361, are substantial and should of themselves have prevented the dismissal of the complaint.

The Secretary is an important, indeed necessary party to the requested determination in each case, and this court has

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20/ See, Kalb v. Feuerstein, 308 U.S. 433, 438, 60 S.Ct. 343, 84 L.Ed. 370 (1940) ("But if appellants are right in their contention that the federal Act of itself, from the moment the petition was filed and so long as it remained pending, operated in the absence of the bankruptcy court's consent, to oust the jurisdiction of the state court so as to stay its power to proceed with foreclosure, to confirm a sale, and to issue an order ejecting appellants from their farm, the action of the Walworth County Court was not merely erroneous but was beyond its power, void, and subject to collateral attack. And the determination whether the Act did so operate is a construction of that Act and a federal question.")

jurisdiction under § 1361 against each Secretary. A long line of federal cases, cited in the McCarty decision at 453 U.S. 222, 101 S.Ct. 2736, 69 L.Ed.2d 600, f.n. 15, makes it clear that military pay is reduced compensation for current but reduced services by the retired officer. For a state court to take away retired pay after it has been fully earned by the officer directly interferes in the employer-employee relationship between the officer and the military.

The lower court suggests that referring the military officers to the state courts will avoid piecemeal resolution of the dispute. But in the state courts the Secretaries of the services are not parties, nor can they be made parties. Instead of promoting resolution of the dispute in one forum, the determinations of the lower court achieves the opposite result: promotes piecemeal litigation since the retired officers must separately proceed against the

Secretaries if they are to have comprehensive relief.

8. The violation of the federal law prohibition against compelling early retirement (10 U.S.C. § 1408(c)(3)) independently supports federal jurisdiction. Petitioner Fern was compelled to retire, because the divorce court had directed that he make immediate payments of his retired pay to his ex-spouse despite his desire to remain in active service. Even here, the Ninth Circuit in the opinion below will countenance no collateral attack and relegates the military officer to his state court remedy. The opinion below ignores the fact that it is federal law, now proceeding beyond McCarty and enshrined in the FSPA itself, 10 U.S.C. § 1408(c)(3), which prohibits a state court from bringing about such a result. Cf., Comments, 8 California Family Law Report 2508 (1984).

Surely in the Fern case the lower court should have retained jurisdiction of the

officer's claim under federal law to entitlement to his active duty pay free from the claims of his ex-spouse under the family court award.

IV. CONCLUSION.

For reasons set forth herein, the Court is requested to grant the petition and to issue a Writ of Certiorari to the Ninth Circuit Court of Appeals for each of the questions presented.

Dated: November 8, 1984.

Respectfully submitted,

KAPLAN, RUSSIN, VECCHI,
EYTAN & COLLINS

By _____
Mattaniah Eytan

Attorney for
Petitioners

APPENDIX

Texts of Constitutional Provisions and Statutes Referred to in Memorandum

Constitutional Provisions

Art. III. Sec. 2, Cl 1.

The judicial Power shall extend to all Cases in Law and in Equity, arising under this Constitution, the Laws of the United States, *** to Controversies *** between Citizens of different states, ***

Amendment V (Due Process of law).

*** nor be deprived of life, liberty, or property, without due process of law; ***

Amendment V (Just Compensation for Property).

*** nor shall property be taken for public use, without just compensation.

Statutes

10 U.S.C. § 688.

(a) Under regulations prescribed by the

Secretary of Defense, a retired member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps may be ordered to active duty by the Secretary of the military department concerned at any time. The Secretary concerned may, to the extent consistent with other provisions of law, assign a member ordered to active duty under this section to such duties as the Secretary considers necessary in the interests of national defense.

10 U.S.C. § 802 (Military Justice Act, Persons Subject to this Chapter).

(a) The following persons are subject to this Chapter:

* * * * *

(4) retired members of a regular component of the armed forces who are entitled to pay.

10 U.S.C. § 3929 (Computation of Old Age Retired Pay).

A member of the Army, retired under this chapter, is entitled to retired pay computed under Chapter 371 of this title.

10 U.S.C. § 2771 (Final Settlement of Accounts: Deceased Members).

In the settlement of the accounts of a deceased member of the armed forces ... an amount due from the armed force of which he was a member shall be paid to the person highest on the following list living on the date of death:

(1) beneficiary designated by him in writing to receive such amount ....

(2) surviving spouse.

(3) children and their descendants by representation.

(4) father and mother in equal parts or, if either is dead, the survivor.

(5) legal representative.

(6) person entitled under the law of the domicile of the deceased member.

10 U.S.C. 8929 (Air Force/Computation of Retired Pay: Where Applicable).

A member of the Air Force retired under this Chapter is entitled to retired pay computed under Chapter 871 of this Title.

28 U.S.C. § 1331 (Federal Question; Amount in Controversy; Costs)

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs and arises under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1332 (Diversity of Citizenship; Amount in Controversy; Costs).

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the

sum or value of $10,000.00, exclusive of interest and costs, and is between --

(i) citizens of different states ***

28 U.S.C. § 1361 (Action to Compel an Officer of the United States to Perform His Duty).

The districts courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

37 U.S.C. § 701 (Army/Air Force Anti-Assignment Act).

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, a commissioned officer of the Army or the Air Force may transfer or assign his pay account, when due and payable.

Albert John FERN, Plaintiff-Appellant,

v.

Joan TURMAN and John O. Marsh, Secretary of the Army, Defendants-Appellees.

Robert Lewis STIRM, Plaintiff-Appellant,

v.

Loretta F. ADAMS and Verne Orr, Secretary of the Air Force, Defendants-Appellees.

Nos. 82-4577, 82-4581.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 12, 1983.

Decided July 10, 1984.

BROWNING, Chief Judge:

Appellants are retired military officers. Both were required by divorce decrees to pay a fixed percentage of their military retired pay to their former wives as divisible community property under state law. Both ceased payments after the United States Supreme Court held in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), that state courts were not free to divide retired military pay under community property laws.

The wives filed motions in the state courts to compel appellants to comply with the decrees. The husbands removed the cases to federal district court. They also filed complaints in federal court naming as defendants not only their wives but also the Secretaries of the Army and Air Force. They asked that the state divorce decrees be declared invalid insofar as they required payment of retired pay to their former wives or, in the alternative, for a declaration that the husbands were no longer subject to recall to active duty.

The complaints were dismissed on the basis of the domestic relations exception to diversity jurisdiction and the failure of the officers to state a federal claim other than as a defense to a claim based entirely on state law. These appeals followed.

While the appeals were pending, Congress passed the Uniform Services Former Spouses' Protection Act (FSPA), permitting state courts to treat retired pay as either personal or community property in accordance with state law. 10 U.S.C. § 1408(c)(i).

Federal question jurisdiction

Appellants argue their claims arise under federal law because their rights to military retired pay are determined by federal statute. They also argue federal question jurisdiction flows from their claims against the federal defendants.

The wives' claims for portions of their husbands' retired pay awarded the wives by the divorce decrees are at the heart of this litigation. These claims arise entirely under state law. The husband's federal preemption claims are defenses to these state claims. They are therefore not claims arising under the laws of the United States. *See Whittington v. Whittington*, 733 F.2d 620 (9th Cir.1984); *Armstrong v. Armstrong*, 696 F.2d 1237 (9th Cir.1983). The same is true for appellants' claim, raised for the first time on appeal, that the FSPA is unconstitutional. This conclusion is not altered by the fact that appellants seek declaratory relief. Appellants' proper course is to assert their federal preemption defenses and unconstitutionality claims in the state court actions and, if rejected there, to seek review in the United States Supreme Court. *Whittington, supra.*

The district court may well have had federal question jurisdiction over appellants' claims against the Secretaries of the Army and Air Force. The contention underlying these claims is that military retired pay is actually reduced compensation for current services, *see McCarty*, 453 U.S. at 222–23, 101 S.Ct. at 2736; *Costello v. United States*, 587 F.2d 424, 426 (9th Cir.1978), including exposure to recall to active duty at any time. 10 U.S.C. § 688(a). Appellants argue that if they are no longer to be paid for this service they cannot be required to perform it. They therefore ask that if the decrees are held valid despite appellants' arguments, the Secretaries be required to remove appellants' names from the active duty recall roster. Jurisdiction to hear this claim is asserted under 28 U.S.C. §§ 1331, 1332, and 1361.

In view of our holding that appellants must pursue their claims in state court, appellants' claims against the Secretaries of the Army and Air Force are not ripe for resolution. Ripeness has "'a twofold aspect, ... the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Pence v. Andrus*, 586 F.2d 733, 737 (9th Cir.1978) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967)).

State court proceedings are ongoing. Until these proceedings are completed and it has been determined that appellants must relinquish a portion of their retired pay, a decision by this court on the claims against the federal defendants would be premature. *See Bergstrom v. Bergstrom*, 623 F.2d 517, 519–20 (8th Cir.1980); *Rhodes v. Laurino*, 601 F.2d 1239, 1241 (2d Cir.1979); *Mendez v. Heller*, 530 F.2d 457, 461 (2d Cir.1976) (Oakes, J., concurring).

Even were we to assume an adverse decision by the state court, another contingency would remain. Until the Secretaries take some action to enforce appellants' military obligations, any decision by this court would address a purely hypothetical situation. There is no indication either appellant faces recall. Appellants' claims against the federal defendants are therefore unfit for judicial resolution because they are contingent both upon a decision of the state court not yet final and an administrative action not yet taken. *See Toilet Goods Ass'n. v. Gardner*, 387 U.S. 158, 163–64, 87 S.Ct. 1520, 1524, 18 L.Ed.2d 697 (1967).

Moreover, until appellants demonstrate a "threat of significant and immediate impact" from Secretarial action, *Kerr-McGee Chemical Corp. v. United States Dept. of Interior*, 709 F.2d 597, 600 (9th Cir.1983), denial of jurisdiction works no hardship on appellants and their claim based upon potential recall for active duty is not ripe. *Id.* at 602.

We reach the same conclusion regarding appellants' argument that the garnishment provision of the FSPA, 10 U.S.C. § 1408(d)(5), under which the Secretary may remit retired pay directly to former spouses, provides the court with jurisdiction. The claim that this provision is contrary to the requirements of *McCarty* is not ripe for adjudication until a garnishment order is served upon the Secretary.

Diversity jurisdiction

Although the order in *Fern v. Turman* is somewhat ambiguous, we conclude that in both cases the district court indicated an intention to exercise its discretion to decline jurisdiction based on the domestic relations exception to diversity jurisdiction. In the circumstances of these cases neither court abused its discretion.

A federal court has jurisdiction over cases when domestic relations issues are implicated only tangentially, *Csibi v. Fustos*, 670 F.2d 134, 137 (9th Cir.1982), but may decline to exercise that jurisdiction where the issues involved are closely related to issues within the domestic relations exception and considerations of comity and policy counsel against federal court intervention. *Id.; Lloyd v. Loeffler*, 694 F.2d 489, 492 (7th Cir.1982); *Sutter v. Pitts*, 639 F.2d 842, 843 (1st Cir.1981); *see also Bergstrom v. Bergstrom*, 623 F.2d 517, 520 (8th Cir.1980); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 632 (6th Cir.1978); *Armstrong v. Armstrong*, 508 F.2d 348, 350 (1st Cir. 1974); *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosentiel*, 490 F.2d 509, 516 (2d Cir.1973). Both of the cases before us fall in this category.

Appellants requested the district court to invalidate a term of their divorce decrees based upon an interpretation of federal law. Such a decision would likely require the state courts to determine whether compensating alterations in the decree, such as the addition or alteration of support terms, are necessary. There are ongoing proceedings in state court in both cases. The federal questions have been raised in these proceedings and can be addressed simultaneously with the question of any necessary modifications in the decree. Equitable considerations favor the resolution of the federal question and any resulting state law questions in a single proceeding. That can only be accomplished in the state court since the federal court could not modify the state court decrees. Duplicative and piecemeal litigation, and the resulting potential for inconsistent state and federal decrees, are avoided and judicial economy is served by allowing these issues to be resolved in state court. *See Lloyd v. Loeffler*, 694 F.2d at 492; *Bennett v. Bennett*, 682 F.2d 1039, 1043–44 (D.C.Cir.1982); *Huynh Thi Anh*, 586 F.2d at 633; *Armstrong v. Armstrong*, 508 F.2d at 350.

The cases relied upon by appellants are distinguishable. *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981), was on appeal from a state court judgment and presented no question of lower federal court jurisdiction. *Crouch v. Crouch*, 566 F.2d 486 (5th Cir.1978), involved an attempt to enforce a final state decree, not an attempt to modify such a state decree. Moreover, no state court proceedings were pending. *Erspan v. Badgett*, 647 F.2d 550 (5th Cir.1981) is a similar case.

Another consideration supports our conclusion. The decision to entertain a claim for declaratory relief rests within the discretion of the court, *see, e.g., Doe v. Gallinot*, 657 F.2d 1017, 1024 (9th Cir. 1981), and "[t]he fact that another action, involving substantially the same issue, is pending in a state or federal court is a potent factor in discretionary refusal to assume jurisdiction." *Puerto Rico Int'l Airlines, Inc. v. Recio*, 520 F.2d 1342, 1346 (1st Cir.1975) (quoting 6A Moore's Federal Practice ¶ 57.08[3] at 57–43 (3d Ed.1974). Judicial discretion to refuse to entertain declaratory actions "should be employed to avoid uncoordinated and unnecessarily disruptive adjudications of disputes in which state and federal issues are intertwined." *Geni-Chlor Int'l, Inc. v. Multisonics Devel. Corp.*, 580 F.2d 981, 985 (9th Cir.1978).

We also note that the usual reason for the exercise of diversity jurisdiction—protection of out of state litigants from state court prejudice—is not applicable here. Both husbands are citizens of California and presumably face no prejudice from California courts. *See Lloyd v. Loeffler*, 694 F.2d at 493; *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosentiel*, 490 F.2d at 515.

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALBERT JOHN FERN, JR., Plaintiff, v. JOAN TURMAN and JOHN O. MARSH, Secretary of the Army, Defendants.	No. C-82-4821-WWS ORDER

In 1978, plaintiff Albert Fern, a colonel in the U.S. Army, obtained a divorce from his then wife, Joan Turman, one of the defendants in this suit. The divorce occurred in California. As part of the marital property settlement Joan Turman was awarded 45% of her ex-husband's military retirement pay, her share of this community property asset. On June 22, 1982, the Supreme Court ruled that state property law treating military retired pay as community property subject to equal division upon divorce conflicts with the congressional

intent that such pay be the personal entitlement of the retired veteran. McCarty v. McCarty, 453 U.S. 210 (1981). The Court did not determine whether this policy of treating military retired pay as separate property would be retroactively applied to property settlements and divorces that preceded the June 1981 decision.

On September 9, 1982, plaintiff filed suit in the federal district court seeking to collaterally attack the state court dissolution decree awarding his ex-wife a share of his army retirement benefits. Plaintiff's argument is that after McCarty the state cannot continue to enforce the decree insofar as it requires that he pay his ex-wife a monthly share of his retirement pay. He seeks an injunction against prospective enforcement of the state decree, retroactive recoupment of amounts already paid to his ex-wife, and declaratory relief.

There is no need to reach the merits of plaintiff's contention that McCarty should be retroactively applied because it is clear from the face of the complaint that this Court lacks jurisdiction to entertain this suit.[1/]

Plaintiff asserts that federal jurisdiction over this matter is proper on the basis of 28 U.S.C. § 1332(a) (diversity of citizenship). Section 1332(a) grants the district court original jurisdiction of all civil actions where matter in controversy exceeds $10,000 and is between citizens of different states. Joan Turman, one of the defendants in this suit, is now domiciled in Texas; the plaintiff resides in California.

An implied exception to diversity jurisdiction has been carved out by the courts in matters of domestic relations and family law. Deference to the classical concerns of federalism, a recognition of the primacy of state law in family matters, and an acknowledgment of the special and

sometimes exclusive competence of state courts to adjudicate domestic relations disputes have led the federal courts to deny or decline jurisdiction in such cases. See generally Bator, Shapiro, Mishkin & Wechsler, The Federal Courts and the Federal System 1189-92 (1973); Wright & Miller, Federal Practice and Procedure, Civil § 3609 (1975).

Much of this law has evolved from dicta in early opinions of the U.S. Supreme Court. In In re Burrus, 136 U.S. 586, 593-94 (1890), the Court stated:

> The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.

When asked to adjudicate matters which implicate state family law and existing state decrees governing relations among husband and wife, or parent and child, some federal courts have denied that they possess jurisdiction to hear such suits under the

diversity statute, 28 U.S.C. § 1332(a). See, e.g., Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968) (no jurisdiction in suit to establish paternity and obtain child support); Hernstadt v. Hernstadt, 373 F.2d 316 (2d Cir. 1967) (no jurisdiction to construe state court divorce decree); Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975) (no jurisdiction under diversity statute in action to enforce separation contract); and Kilduff v. Kilduff, 473 F. Supp. 873 (S.D.N.Y. 1979) (no jurisdiction over property and child custody agreement in matrimonial dispute).

Other courts have treated the question as one of abstention and have declined to exercise jurisdiction in actions to modify or enjoin the enforcement of state family law decrees. See, e.g., Armstrong v. Armstrong, 508 F.2d 348 (1st Cir. 1974) (policy and comity dictate abstention in action to modify divorce decree).

In this case, plaintiff attempts to collaterally attack a state court decree awarding his ex-wife a share of his army retirement benefits under state community property law. Plaintiff's proper recourse to challenge the validity of this decree is to appeal the state court judgment and raise his McCarty claim of federal preemption therein. Alternatively, plaintiff may assert this defense in an action to enforce the decree. The action is therefore dismissed for lack of subject matter jurisdiction.[2]

IT IS SO ORDERED.

DATED: September 21, 1982

/signed
WILLIAM W. SCHWARZER
United States District Judge

FOOTNOTES

1/ The Court can and should raise the lack of subject matter jurisdiction sua sponte if, at any time, there is a question whether jurisdiction is proper. See, e.g., AMFAC Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 426, 430 n.5 (9th Cir. 1978).

2/ Leave to amend the complaint to assert jurisdiction under 28 U.S.C. § 1331(a) (federal question jurisdiction) will not be granted. The Court recently rejected McCarty as a basis for federal question jurisdiction in Swatosh v. Swatosh, No. C-82-4502-WWS (N.D. Cal., September , 1982) (Schwarzer, J.) and Lovato v. Lovato, No. C-82-0153-WWS (N.D. Cal., May 12, 1982) (Schwarzer, J.). A case does not arise under the Constitution or under federal statutory law merely because a defense based on federal law may be interposed. Nalore v. San Diego Federal Savings & Loan Assoc., 663 F.2d 841, 842 (9th Cir. 1981). And the Declaratory Judgment Act does not create jurisdiction in the federal courts merely because a litigant anticipates a federal defense. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673 (1970). Federal preemption of state property law constitutes a possible defense to the enforcement of a state divorce decree preceding the McCarty decision, a defense which may properly be asserted in the state court.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT LEWIS STIRM, Plaintiff, v. LORETTA F. ADAMS, Defendant, and VERNE ORR, SECRETARY OF THE AIR FORCE, Defendant.	No. C 82-0723 SW No. C 82-0749 SW ORDERS DISMISSING ACTION C 82-0749 AND REMANDING ACTION C 82-0723

Plaintiff in this action, Robert Lewis Stirm ("Stirm"), entered the United States Air Force on September 18, 1953, and retired as a colonel on June 1, 1977. On February 6, 1955, while he was on active duty, Stirm married defendant Loretta F. Adams ("Adams"). After eighteen years of marriage, Adams filed a petition for dissolution of the marriage in the San Mateo Superior Court. On July 22, 1974, the court filed an Amended Interlocutory Judgment of

Dissolution of Marriage. The decree of dissolution became final on August 15, 1974. Neither judgment was appealed.

In dividing the community property between the parties, the Amended Interlocutory Judgment distributed 42.6899% of Stirm's retirement pay to Adams (accrued as of September 17, 1973), and 42.6899% of Stirm's retirement pay to himself. The balance of the pay was confirmed to Stirm as his separate property. This division was in accordance with well-established California community property law at that time.

In June 1981, the United States Supreme Court ruled that federal law preempted state law from dividing a spouse's military retirement benefits upon a dissolution of marriage. McCarty v. McCarty, 453 U.S. 210 (1981). After the McCarty decision was handed down, Sitrm ceased making payments as required by the Amended Interlocutory Decree. On February 1, 1982, Adams moved the state court for an order to compel

compliance with the 1974 decree. Instead of defending in state court with a federal preemption argument, Stern purported to remove the "action" to this court pursuant to 28 U.S.C. § 1442a.

Shortly after affecting removal, Stirm filed an action in this court under 28 U.S.C. §§ 1331 and 2201. His complaint seeks a declaration that the 1974 state judgment is void insofar as it requires payments from his military retirement pay, based on the preemption of state community property law by federal veteran's legislation. The complaint also names Verne Orr, Secretary of the Air Force, as defendant for an alternative declaration that, if Stirm is subject to payment of a pro-rata share of his retirement pay to Adams, he must be removed from the list of retired officers who are subject to recall into active service, and whose continuing obligation is compensated for by the retirement pay.

Adams brought a motion to dismiss these complaints under Rule 12(b), arguing that the court lacked subject matter jurisdiction, that the McCarty decision was not retroactive, and that the state court judgment entered in 1974 was res judicata on all issues presently in dispute. Stirm filed his owr. motion for summary judgment arguing in essence that the previous state court judgment arguing in essence that the previous state court judgment would be collaterally attacked under the holding of the McCarty case.

After careful and lengthy consideration of the excellent and well-supported briefs of both parties, of the declarations and of all other relevant matters in the record, the court concludes that it is without jurisdiction over the declaratory relief action and that the state court "action" was improvidently removed. See Lovato v. Lovato, No. C-82-0153-WWS, (N.D. Cal. May 12, 1982) (Schwarzer, J.).

1. Removal Jurisdiction

A suit can be removed to federal court under 28 U.S.C. § 1441(a) only if it could have been brought here originally. Guinasso v. Pacific First Federal Savings & Loan Association, 656 F.2d 1364, 1365 (9th Cir. 1981). In order for this court to have original jurisdiction of the claims in this case, the action must "arise under" the laws of the United States. In addition, the asserted federal right must be an essential element of the plaintiff's cause of action, and the federal controversy must be "disclosed upon the face of the complaint, unaided by the answer. . . ." Gully v. First National Bank, 299 U.S. 109, 113 (1936).

In the present case, the "action"[1] Stirm removed from state court involved entirely state dissolution issues. The claim of federal preemption was made only in defense of Adams' attempt to enforce the previously entered judgment. It is well-established that a claim of federal preemption, taken alone, is not a basis for removal jurisdiction. Eureka Federal Savings & Loan Association v. Patterson, 534 F. Supp. 479, 481 (N.D. Cal. 1982).

This is not a case where state regulations directly conflict with federal regulations governing a federal association Cf. Conference of Federal Savings & Loan Association v. Stein, 604 F.2d 1256, 1259 (9th Cir. 1979), aff'd mem., 445 U.S. 921 (1980) (court held that justicable

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1/ The state dissolution proceedings could not really have been "removed" since they were terminated by final judgment in 1974. Stirm only purports to remove Adams' state court motion to enforce the judgment not the entire action.

controversy under Article III existed where state and federal agencies took conflicting positions). On the contrary, the "federal" controversy here arises not on the basis of a perceived conflict that generated the complaint but rather solely on the basis of Stirm's defense to the state court action. Adams' complaint, the only basis upon which this court can assert its own jurisdiction, does not implicate federal law in any way.

In the alternative, Stirm seeks to remove this case on the basis of 28 U.S.C. § 1442a which provides in pertinent part:

> A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof, or under the law of war, may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States for the district where it is

> pending in the manner prescribed by law, . . .

The present case does not involve an act done under color of Stirm's office or status as an Air Force officer. Furthermore, the implication of federal law, if at all,[2/] in no way involves the armed forces but rather a private dissolution proceeding between two parties, one of whom happens to have been in the armed services. Accordingly, removal on the basis of section 1442a was improvident and the "action" must be remanded to the state court.

2. Declaratory Relief

Plaintiff attempts to present the federal preemption issue to this court by way of an action for declaratory relief.

2/ The court notes that the McCarty rule appears to be inapposite to the facts of the present case. Courts have held both that the new federal rule cannot be applied retroactively, In re Marriage of Sheldon, 124 Cal. App. 3d 371, 177 Cal. Rptr. (1981) and that application of federal preemption is barred by res judicata. Erspan v. Badgett, 659 F.2d 559 (5th Cir. 1981)

However, it is well-established that "[t]he operation of the Declaratory Judgment Act is procedural only." Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 671 (1949). The Act widened the "range of remedies available in federal courts but did not extend their jurisdiction." Id. Therefore, a claim of federal preemption of a state domestic relations case[3/] cannot serve as a basis for subject matter jurisdiction, even if presented in the form of a request for declaratory relief. Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952).

Therefore, in light of the discretionary nature of a request for declaratory relief, see Travelers Indemnity Co. v. Boles, 503 F. Supp. 179 (N.D. Cal. 1980), aff'd mem. (9th Cir. 1982) and the

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3/ Of course, federal courts traditionally have refrained from exercising jurisdiction over cases which in essence are domestic relations disputes. Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981).

lack of jurisdiction, the court dismisses plaintiff's original complaint. Similarly, plaintiff's alternative complaint against the Secretary of the Air Force is dismissed without prejudice. See Lovato v. Lovato, No. C-82-0153-WWS (N.D. Cal. May 12, 1982).

CONCLUSION

IT IS HEREBY ORDERED that Action No. C 82-0723 SW is remanded to state court.

IT IS FURTHER ORDERED that Action No. 82-0749 is dismissed.

IT IS SO ORDERED.

DATED: 9/3/84

/Spencer Williams
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Marriage of ALBERT JOHN FERN, JR., Petitioner, v. JOAN FERN, Respondent.	No. C-82-2189-WAI O R D E R

The above-entitled action is REMANDED to the Superior Court of the State of California, in and for the County of Monterey.

Removal is improper under either 28 U.S.C. § 1331 or § 1331 [sic]. No federal question is presented, and cases involving domestic relations are exempted from the jurisdictional grant predicated upon diversity of citizenship. Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968).

DATED: 9-15-82

/signed
WILLIAM A. INGRAM
United States
District Judge

SUPREME COURT OF THE UNITED STATES

No. A-226

ALBERT JOHN FERN AND ROBERT LEWIS STIRM,

Petitioners,

v.

JOAN TURMAN, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 8, 1984.

/s/ William H. Rehnquist
Associate Justice of the
Supreme Court of the
United States

Dated this 1st day of
October, 1984.

CERTIFICATE OF SERVICE

I, MATTANIAH EYTAN, one of the attorneys for petitioners Albert John Fern, Jr. and Robert Lewis Stirm, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of November, 1984, I served copies of the foregoing Petition for Writ of Certiorari on the several parties thereto, as follows:

1. On John O. Marsh, Secretary of the Army and Verne Orr, Secretary of the Air Force by depositing a copy of the document in a United States mailbox, with first class postage prepaid, addressed to G. Christopher Stoll, Esq., Assistant to the United States Attorney, 450 Golden Gate Avenue, 16th Floor, San Francisco, California 94102 and by depositing a copy of the Petition in a United States mailbox, with first class postage prepaid, addressed to Solicitor General, Department of Justice, Washington D.C. 20530.

2. On Joan Turman, by depositing a copy of the Petition in a United States mailbox, with first class postage prepaid, addressed to her counsel of record, Katherine E. Stoner, Esq., STONER, WELSH & SCHMIDT, 229 17th Street, P.O. Drawer H, Pacific Grove, California 93950.

3. On Loretta F. Adams by depositing a copy of the Petition in a United States mailbox, with First Class postage prepaid, addressed to her counsel of record, Michael A. Atherton, Esq., Atherton & Gunn, 550 Hamilton Avenue, Palo Alto, California 94603.

Mattaniah Eytan,

Attorney for Petitioners
Albert John Fern, Jr.
and Robert Lewis Stirm

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Office - Supreme Court, U.S.
FILED
DEC 19 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-769

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1984

ALBERT JOHN FERN, JR. and
ROBERT LEWIS STIRM, PETITIONERS,

vs.

JOAN TURMAN, JOHN O. MARSH,
SECRETARY OF THE ARMY, LORETTA F. ADAMS
AND VERNE ORR, SECRETARY OF THE AIR FORCE,
RESPONDENTS.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Did the federal district courts in the cases below properly decline to exercise diversity jurisdiction, where the complaints sought declaratory judgments invalidating final state court divorce judgments which divided military retirement benefits as marital property, and where the federal issues involved had been raised in pending state divorce court proceedings?

(2) Was the district courts' refusal to exercise federal question jurisdiction proper in the cases below, where the federal questions alleged had vitality only as defenses to enforcement of the state court divorce judgments?

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OPINIONS BELOW

The opinions of the lower courts are correctly cited in the Petition.

JURISDICTION OF THIS COURT

Petitioners' basis for invoking jurisdiction, as set forth in the Petition, is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The questions presented by the Petition relate to the jurisdiction of federal district courts to decline to decide matters which are the subject of ongoing state court proceedings. Thus, the statutes primarily involved are those governing diversity jurisdiction, 28 U.S.C. § 1332(a) and federal question jurisdiction, 28 U.S.C. § 1331(a).

The cases below also involved jurisdiction under 28 U.S.C. § 1361 as

to the claims against the Secretaries of the Army and Air Force. The lower court held that the claims against those defendants were not ripe. The questions presented by the Petition do not include the ripeness issue.

STATEMENT OF THE CASE

The issues requiring consideration are relatively simple, straightforward questions concerning the scope of federal jurisdiction. The validity of final state court divorce judgments dividing military retirement benefits is not at issue, nor are the petitioners' claims against the Secretaries of the Army and Air Force.

In their "Statement of Facts" petitioners have enveloped these simple issues in a cloud of irrelevancies and misplaced argument. For the sake of clarity, the facts material to this case are presented below.

The case involves two separate actions for declaratory relief which were dismissed by the federal district courts for lack of jurisdiction and consolidated on appeal to the Ninth Circuit Court of Appeals. Each complaint had been filed by a retired military officer against his

former spouse and the Secretary of the military branch in which he had served. The Ninth Circuit affirmed the orders dismissing the complaints, and the retired officers have petitioned this Court for a Writ of Certiorari.

Petitioner ROBERT LOUIS STIRM is a former Air Force officer. He was married to respondent LORETTA ADAMS for eighteen years. In California State Court divorce proceedings, STIRM's military retirement benefits were found to be community property and were divided accordingly. The divorce Judgment became final in 1974, and STIRM took no appeal.

Similarly, petitioner ALBERT FERN, now a retired Army officer, was married to respondent JOAN TURMAN for twenty-four years. In a divorce Judgment which became final in 1978, the California Superior Court divided the community property interest in FERN's military retirement

benefits according to applicable California law. FERN did not appeal the Judgment.

Both STIRM and FERN stopped making payments of their retirement benefits to their former spouses at about the time this Court decided McCarty vs. McCarty 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed. 2d 589 (1981).

In February of 1982, respondent ADAMS filed a Motion in the California divorce Court to enforce her right to a portion of STIRM's retirement benefits under the 1974 Judgment.

Likewise, respondent TURMAN filed an enforcement Motion in the California divorce Court in April of 1982.

The enforcement proceedings are now pending on appeal in the California courts, petitioners having unsuccessfully attempted to remove them to the federal district courts.

Not satisfied with having raised their federal defenses in the state court

enforcement proceedings, STIRM and FERN, in separate actions, filed complaints for declaratory relief in the federal district courts. STIRM's action was filed in February of 1982, FERN's in September of that year.

STIRM's Complaint alleged federal question jurisdiction under 28 U.S.C. § 1331. FERN's Complaint alleged diversity jurisdiction under 28 U.S.C. § 1332(a). In addition to their former spouses, petitioners named as defendants the Secretaries of the Air Force and Army.[1/]

1/ FERN alleged diversity jurisdiction against the Secretary of the Army; STIRM invoked jurisdiction under 28 U.S.C. §§ 1331, 1332 and 1361 as against the Secretary of the Air Force. The Ninth Circuit held that the claims against the Secretaries were not ripe, and petitioners have not sought review of that holding by this Court.

In their complaints, petitioners STIRM and FERN asked for declaratory judgments that the final state court divorce decrees were invalid to the extent they divided petitioners' military retirment benefits. Alternatively, they sought declaratory judgments that they were no longer subject to recall to active duty (See footnote 1/).

Both complaints were dismissed, the federal district court in each case concluding that petitioners had failed to state a federal claim other than as a defense to the state court divorce decrees. As to diversity jurisdiction in the FERN case, the Court declined jurisdiction on the basis of the domestic relations exception to diversity jurisdiction.

Both STIRM and FERN appealed, and their cases were consolidated before the Ninth Circuit Court of Appeals.

The Ninth Circuit affirmed the dismissals in both cases. Regarding federal question jurisdiction, the Court held that the federal claims were not claims arising under the laws of the United States, but rather defenses to state claims which should be raised in the pending state court actions, and not by way of declaratory relief actions in federal court.

As to the claims against the Secretaries of the Army and Air Force, the Ninth Circuit held that, inasmuch as they were contingent upon completion of the state court proceedings, as well as upon administrative action by the Secretaries, those claims were not yet ripe for adjudication.

With respect to diversity jurisdiction, the Ninth Circuit held that, under the circumstances present, the district court property exercised its discretion to decline jurisdiction based on the domestic relations exception to diversity

jurisdiction.

Additionally, the Court noted that the district courts have equitable discretion to decline requests for declaratory relief where, as here, state court proceedings involving substantially the same issues are pending. 2/

Petitioners seek review of the Ninth Circuit opinion, claiming that the decision was erroneous and conflicts with decisions in other circuits. Respondent disagrees, and hopes to show that the Ninth Circuit's decision was proper and consistent in the main with those of other circuits.

2/ Petitioners had briefed the merits of their cases to the Ninth Circuit in anticipation of a claim that passage of the Uniformed Services Former Spouses Protection Act (10 U.S.C. § 1408, henceforth "FSPA") rendered petitioners' claims moot. However, neither the merits of petitioners' claims, nor the question of mootness were addressed in the Ninth Circuit's opinion.

SUMMARY OF ARGUMENT

Respondent submits that the lower courts correctly concluded that there was no federal question jurisdiction over the underlying actions. A case does not arise under federal law when the federal question is merely an anticipated defense to a state claim. FSPA did not confer independent jurisdiction on the lower courts, nor was the domestic relations exception applied to federal question jurisdiction.

Diversity jurisdiction was properly declined by the lower courts on the basis of the domestic relations exception. The exception is to be applied in cases such as these, where there are state actions pending involving the same issues, and there is a risk of piecemeal and duplicative handling of the controversy.

The lower courts acted within the

scope of their equitable discretion in declining to entertain petitioners' claims for declaratory relief, especially in light of the pendency of the ongoing state proceedings.

The decisions of the lower courts do not present a conflict with those of other circuits. All circuits weigh the same policy considerations in applying the domestic relations exception, and those policy considerations favored application of the exception here.

It is unlikely that petitioners will ultimately prevail in their claims on the merits. But even if their claims are valid, their proper course is to pursue those claims first through the state courts, and then if necessary to seek review in this Court.

No grounds having been established for review by this Court, the Petition should be denied.

ARGUMENT

I. THE LOWER COURTS PROPERLY DISMISSED PETITIONERS' COMPLAINTS.

A. Petitioners Failed to Establish Federal Question Jurisdiction in the Lower Courts.

The Ninth Circuit held that there was no federal question jurisdiction where the federal issues raised by petitioners were viable only as defenses to enforcement of the state court claims and not as questions "arising under" federal law. 28 U.S.C. § 1331.

It is well settled that a case does not arise under federal law when the federal question is merely an anticipated defense to a state lawsuit. Rath Packing Co. vs. Becker, 530 F. 2d 295, 1304 (9th Cir. 1975) affd. 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed. 2d 604 (1977); Alton Box Board Co. vs. Esprit de Corp., 682 F.2d 1267, 1273-74 (9th Cir. 1982).

Less than one year ago, this Court denied review of a virtually identical

case in which the Ninth Circuit had affirmed dismissal of a complaint for declaratory relief brought by a former military officer seeking to invalidate a state court divorce judgment dividing his military retirement benefits and invoking federal question jurisdiction. Armstrong vs. Armstrong, 696 F.2d 1237 (9th Cir. 1983) cert den ____ U.S. _____, 104 S.Ct. 337, 78 L.Ed. 2d 306 (1983).

Petitioners also assert that 10 U.S.C. § 1408(c)(3) "independently supports federal jurisdiction" (Petition, page 52).

The statute referred to by petitioners is a provision of FSPA which proscribes the authority of a state court to order a military member to retire in order to effect a division of retired pay.

This statute does not, either expressly or impliedly, confer independent jurisdiction upon federal district courts. At most, the statute gives rise to a federal right which must be analyzed under

the applicable standard relating to federal question jurisdiction, along with petitioners' other federal claims.

In their desperate assault on the decisions below, petitioners also contend that the lower courts sought to extend the domestic relations exception to federal question jurisdiction (Petition, page 31). This contention lacks support in the record and can only be based on an erroneous reading of the opinions below.

Nowhere in their treatment of federal question jurisdiction did the lower courts in this case purport to apply the domestic relations exception. Instead, they uniformly analyzed the federal question issue according to the traditional standards discussed above. Thus, the decisions below cannot be said to be erroneous on that basis, nor do they present any conflict with other circuits in the federal question context.

B. The District Court Did Not Abuse Its Discretion in Declining Diversity Jurisdiction.

The FERN Complaint for declaratory relief invoked diversity jurisdiction under 28 U.S.C. 1332(a). The District Court applied the domestic relations exception to diversity jurisdiction and dismissed the Complaint. The Ninth Circuit affirmed, holding that the District Court properly exercised its discretion in applying the domestic relations exception.

Petitioners have offered no pursuasive reason for overturning the decisions of the lower court with respect to diversity jurisdiction.

The domestic relations exception to diversity jurisdiction is by now well established in all circuits. 13 C. Wright, A. Miller & E. Cooper, Federal Practice And Procedure, "Jurisdiction" Section 3609 (1975); Comment, "Federal Jurisdic-

tion and the Domestic Relations Exception: A Search for Parameters," 31 U.C.L.A. Law Rev. 843, 843-845 (1984), hereafter "Federal Jurisdiction."

Whether the domestic relations exception is viewed as depriving federal courts of jurisdiction or grounds for discretionary abstention,3/ sound policy reasons support its application in appropriate circumstances. As articulated

3/ Some courts view the exception as a matter left entirely to the discretion of the federal courts; others take the position that the grant of diversity jurisdiction did not include jurisdiction over domestic relations matters, and that abstention comes into play only when domestic relations issues are but tangentially involved. See Jagiella vs. Jagiella 647 F.2d 561, 564, note 11 (5th Cir. 1981); Csibi vs. Fustos 670 F.2d 134, 137 (9th Cir. 1982); Phillips, Nizer, Benjamin, Krim & Ballon vs. Rosentiel 490 F.2d 509, 516 (2d Cir. 1973). But the difference is academic; under either approach an examination of the underlying nature of the case and an application of the policy considerations supporting the exception will dictate the same result.

by the Fifth Circuit in Crouch vs. Crouch 566 F.2d 486, 487 (5th Cir. 1978), those policy reasons include:

> "The strong state interest in domestic relations matters, the competence of state courts in settling family disputes, the possibility of incompatible federal and state court decrees in cases of continuing judicial supervision by the state, and the problem of congested dockets in federal courts."
>
> 566 F.2d at 487

Among the most significant factors to be considered in determining whether to apply the domestic relations exception is the pendency of state court proceedings involving the same issues or the "threat that the former spouses will seek to play one court system off against the other." Crouch, supra, 566 F.2d at 487. In such cases federal courts generally decline jurisdiction in order to avoid the possibility of "piecemeal, duplicative, or inexpert handling of what is substantially a single controversy." Lloyd vs. Loeffler 694 F.2d 489, 493 (7th Cir. 1982).

In the cases before this Court, there are ongoing state court proceedings involving substantially the same issues raised by petitioners' federal complaints.

Furthermore, if Petitioners are successful in their attacks on the state courts' division of the retirement benefits, this will work a modification of the divorce decrees and may well require adjustment of other aspects of the divorce decrees such as spousal support, child support, division of other property, or claims for reimbursement or attorneys' fees, all of which can best be determined by the state divorce courts, which retain jurisdiction under local law to make such post-judgment orders as may be just under the circumstances. California Civil Code Sections 4700, 4357, 4380 and 4811.

The lower courts in this case clearly recognized the existence of ongoing state court proceedings in which petitioners would have an opportunity to litigate their

federal claims. In light of the risk of piecemeal and duplicative handling of these controversies and the threat that this litigation could be used to play one court system off against the other, and with deference to considerations of comity, the lower courts properly applied the domestic relations exception and declined diversity jurisdiction.

C. Dismissal of the Claims For Declaratory Relief Was Within the Discretion of the District Courts.

The decision whether to entertain petitioners' complaints for declaratory relief was addressed to the sound discretion of the district courts. Public Affairs Press vs. Rickover, 369 U.S. 111, 82 S.Ct. 580, 7 L.Ed. 2d 604 (1962); Puerto Rico Int'l. Airlines, Inc. vs. Recio, 520 F.2d 1342, 1336 (1st Cir. 1975); 6 A. Moore's Federal Practice, paragraph 57.08 [3] at 57-43 (3 Ed. 1974).

The pendency of another action involving substantially the same issues

is a determinative factor in declining to exercise equitable jurisdiction, and thus avoiding duplicative and uncoordinated adjudications of the same disputes. Puerto Rico, supra, 369 U.S. 111, 82 S.Ct. 580, 7 L.Ed.2d 604 (1962); Geni-Chlor Int'l., Inc. vs. Multisonics Devel. Corp. 580 F.2d 981, 985 (9th Cir. 1978).

This is a form of judicial abstention distinct from the Pullman doctrine of abstention referred to by petitioners (Petition, pages 44-45). The Pullman doctrine dictates federal abstention from controversies which may be resolved on the basis of state law rather than federal law where sensitive areas of state social policy are involved. Railroad Commission of Texas vs. Pullman Co., 312 U.S. 496, 500, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

The issues raised by petitioners are clearly federal issues and cannot be resolved on the basis of state law. The

lower courts did not attempt to justify dismissal of petitioners' complaints on the basis of Pullman-type abstention.

However, the Pullman doctrine represents only one facet of federal judicial abstention.4/ Equitable restraint in declaratory relief actions is yet another form of abstention.

The type of abstention involved here stems from the traditional doctrine that a court of equity should refrain from action when an adequate remedy exists elsewhere, and is reinforced in the federal context by considerations of comity which militate against federal interference with state court proceedings. Huffman vs. Pursue Ltd. 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482, 490.

4/ For a discussion of abstention generally see Comment, "Federal Jurisdiction" 31 U.C.L.A. Law Rev. 843, 881, note 314.

Here, given that state court proceedings are pending in which petitioners have raised the same federal issues forming the bases of their requests for federal equitable relief, the district courts appropriately declined to exercise equitable jurisdiction, and rightly left petitioners to adjudicate their claims in the state court proceedings.[5/]

5/ Petitioners complain that the state courts are "hostile" to their claims, and that the result on appeal in the state court actions "appears to be pre-ordained." (Petition, pages 20 and 24). Petitioners are, in effect, urging this Court to accept review on the assumption that the state courts will not be faithful to their constitutional responsibilities. This Court has refused to make such an assumption in the past, and there is no reason to make that assumption now. See Huffman vs. Pursue, Ltd., supra, 420 U.S. 592, 611, 95 S.Ct. 1200, 43 L.Ed.2d 482, 496 (1975) and Dombrowski vs. Phister, 380 U.S. 479, 484-485, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

II. NO CONFLICT BETWEEN THE CIRCUITS IS PRESENTED BY THIS CASE.

Petitioners assert that the actions of the lower courts in dismissing the complaints conflict with decisions in other circuits. Specifically, petitioners contend that the lower courts applied the domestic relations exception in a manner which conflicts with the approach followed by other circuits. (Petition, pages 26 - 34).

According to petitioners the lower courts sought to "extend the marital exception to the federal question context" (Petition, page 31). This is simply not true.

The lower courts in this case did not employ the domestic relations exception in any form in dismissing the complaints for lack of federal question jurisdiction. Instead, the lower courts held that the federal issues raised by petitioners did not arise under federal law but had

vitality only as defenses to the state divorce decrees. Armstrong vs. Armstrong, supra, 696 F.2d 1237 (9th Cir. 1983) cert den _____ U.S. ____, 104 S.Ct. 337, 78 L.Ed.2d 306 (1983); See also discussion, supra, pages 10-12 of this brief.

In this approach to federal question jurisdiction, the decisions of the lower courts did not conflict with those of other circuits, and require no review in this Court.

Likewise, the decisions of the lower courts regarding diversity jurisdiction do not present a conflict with other circuits, notwithstanding the application of the domestic relations exception.

The history of the domestic relations exception does not require re-examination here. It is enough to note that the exception has its roots in the opinions of this Court, and is by now a well established principle of diversity

jurisdiction.[6]

Petitioners claim that "hopeless confusion" exists among the circuits in their application of the domestic relations exception. A careful reading of the opinions of the various circuit courts reveal, at most, a difference in approach. This difference can lead to differing results when the cases under consideration go far beyond the traditional concerns of state domestic relations courts, as in tort actions between family members or civil rights actions against governmental agencies or employees for interference with family relationships. See Comment, "Federal Jurisdiction" 31 U.C.L.A. Law Rev. 843, pages 859, 870-871.

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[6] See Barber vs. Barber, 62 U.S. (21 How.) 582, 584 (1858); In re Burrus, 136 U.S. 586 (1890); Ohio ex rel Popovici re Agler, 280 U.S. 379 (1930). For further discussion of the evolution of the domestic relations exception, see Comment, "Federal Jurisdiction" 31 U.C.L.A. Law Rev. 843, pages 847-851.

Even if such a conflict can be said to exist on the outer fringes of the domestic relations exception, that conflict certainly is not presented by this case.

It is universally acknowledged that strong policy reasons support the application of the domestic relations exception in appropriate cases:

> "The exercise of federal jurisdiction in domestic actions such as those for divorce, alimony, or custody would create the possibility of piecemeal, duplicative, or inexpert handling of what are generally single controversies in a very sensitive area. This would not be in the best interests of a troubled family. Futhermore, the exercise of federal jurisdiction in this area could also result in incompatible federal and state decrees in cases subject to the continuing jurisdiction of the state. These reasons, as well as the strong state interest in domestic relations matters within its borders and the superior competence of the state courts in adjudicating and monitoring family disputes, warrant the continued application of the domestic relations exception to diversity cases by the federal courts."
>
> Comment, "Federal Jurisdition, 31 U.C.L.A. Law Rev. 843, at 852-853, and cases referred to therein.

The cases below illustrate graphically the very concerns which have been expressed repeatedly by the courts considering the application of the domestic relations exception. The state court enforcement actions here predated the filing of the federal complaints, and petitioners' claims are in reality only defenses to the state court divorce decrees which divided their military retirement benefits, and which are now the subjects of the enforcement actions. For a federal court to intervene in such a case it is virtually to guarantee the duplicative, piecemeal and potentially incompatible results which the domestic relations exception was designed to avoid.

Petitioners claim that the Fifth Circuit position, in particular, cannot be reconciled with the lower court actions here. In support of their contention, petitioners point in particular to Erspan vs. Badgett, 647 F.2d 550

(5th Cir. 1981), which petitioners say "directly conflicts" with the decision below.

Erspan was an action to enforce a state court judgment ordering payment of specified amounts. In contrast, petitioners' federal complaints here seek to partially invalidate (and thus effectively modify) the state court divorce judgments.

Additionally, Erspan did not involve pending state court proceeedings, to which the Court might well, on policy grounds, have deferred. Again, this is in contrast to the situation here, where state litigation involving the identical issues is being actively pursued.

In Erspan, the Court reviewed the traditional policy considerations underlying the domestic relations exception, including the existence of "pending state court action," the "possibility of incompatible federal and state court decrees in cases of continuing judicial supervi-

sion by the state," and the "threat that the former spouses will seek to play one court system off against the other." The Court correctly concluded in Erspan that the case involved "none of the concerns upon which the domestic relations exception rests," and therefore approved the district court's assertion of diversity jurisdiction. Erspan, supra, 647 F.2d at 553, note 1.

The Ninth Circuit in its Opinion below considered Erspan and appropriately distinguished it on its facts, after examining the same policy considerations weighed by the Erspan court.

Since no real conflict exists between the circuits as to the correct application of the domestic relations exception in the circumstances presented, there is no need for review by this Court, and the decisions below should stand.

III. PETITIONERS' PROPER COURSE IS TO LITIGATE THEIR FEDERAL DEFENSES IN THE STATE COURT ENFORCEMENT PROCEEDINGS.

A substantial portion of the Petition is devoted to the merits of petitioners' underlying complaints (Petition, pages 12-25), even though the issues on the merits are well beyond the scope of the Petition itself. Petitioners' main arguments on the merits are two-fold:

1. Petitioners claim that this Court's decision in McCarty v. McCarty, supra, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981) rendered the final state court divorce decrees void ab initio to the extent they divided petitioners' military retirement benefits. Petitioners take the position that decisions based on federal pre-emption, such as McCarty, require retroactive application to final state court judgments, notwithstanding principles of res judicata.

2. Petitioners also attack the constitutional validity of FSPA (10 U.S.C. § 1408), the federal legislation which clarified Congress' intent to permit state divorce courts to divide military retirement benefits. Petitioners contend that FSPA violates the Fifth Amendment

by divesting petitioners of a portion of their retirement pay.[7/]

Neither of petitioners' claims on the merits is likely to be successful, either in federal court or in state court.

With respect to petitioners' first claim, the vast majority of jurisdictions considering the retroactivity of the McCarty decision have decided against retroactive application.

7/ Ironically, even as this challenge to FSPA is made, petitioner FERN relies on FSPA in attacking the divorce court's prior order that he pay to his former wife a portion of his retirement pay at the time when he was eligible for retirement, claiming that this in effect required him to retire contrary to Section 1408(c)(3) of the Act. FERN did not, in fact, retire when the Judgment was rendered, nor did he appeal or otherwise take exception to the divorce court's order in that respect, and it is difficult to understand how he can justify a constitutional attack on the Act while at the same time invoking its protection against a portion of the divorce decree long since acquiesced in.

Among the cases which have so held are: In re Marriage of Mahone, 123 Cal.App.3d 17, 176 Cal.Rptr. 274 (1981); In re Marriage of Sheldon, 124 Cal.App.3d 371, 177 Cal.Rptr. 380 (1981), appeal dismissed for want of a substantial federal question 456 U.S. 941, 102 S.Ct. 2002, 72 L.Ed.2d 462 (1982); In re Marriage of Fellers, 125 Cal.App.3d 254, 178 Cal.Rptr. 35 (1981); In re Marriage of McGhee, 131 Cal.App.3d 408, 182 Cal.Rptr. 456 (1982); Erspan vs. Badgett, supra, 647 F.2d 550 (5th Cir. 1981), reh. den. en banc with opinion, 659 F.2d 26 (1981), cert. den. 102 S.Ct. 1433; Wilson vs. Wilson 667 F.2d 497 (5th Cir. 1982); Duke vs. Duke 643 P 2d 1205 (Nev. 1982); Vinson and Vinson, 644 P 2d 635, (Or.App.1981); Duren vs. Duren, 627 SW 2d 585 (Ky.1982); Ex parte Rodriguez, 628 SW 2d 500 (Tex.App.1981); Ex parte Gaudion, 628 SW 2d 500 (Tex.App.1982);

Ex Parte Welch, 633 SW 2d 691 (Tex.App. 1982); Ex Parte Hovermale 636 SW 2d 828 (Tex.App.1982).

The leading California decision in this area is In re Marriage of Sheldon, supra, 124 Cal.App.3d 371 (1981) dism. 456 US 941. The Sheldon court analyzed the retroactivity question in terms of the test formulated by this Court in Chevron Oil Co. vs. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).

Petitioners assert that the Chevron Oil holding does not set forth the correct test for determining retroactivity of the McCarty decision. In place of the Chevron Oil test, petitioners cite Firestone Tire & Rubber Co. vs. Risjord, 449 U.S. 368, 379, 101 S.Ct. 669, 66 L.Ed.2d. 571 (1981) and Holzsager vs. Valley Hospital, 446 F.2d 792, 798 (2d Cir. 1981), (concurring opinion). Neither of these cases is applicable to the retroactivity question presented by

McCarty.

Risjord did not involve questions of federal pre-emption, nor any question of retroactivity beyond the very case under consideration there. Risjord simply stands for the proposition that where a lower court properly finds that it lacks jurisdiction to decide a case, it may not proceed to decide the merits of that claim simply because its decision on the jurisdictional issue represents a departure from precedent.

Holzsager approved retroactive application of a decision limiting quasi in rem attachment jurisdiction. However, the case did not involve a prior judgment or principles of res judicata. Moreover, the lead opinion in that case expressly followed Chevron Oil in determining the retroactivity question.

Chevron Oil, supra, requires consideration of the following three

factors: 1) whether the decision in question establishes new law by overruling clear past precedent, 2) whether the history, purpose and effect of the new decision mandates retroactive application, and 3) whether retroactive application of the decision would produce substantial inequity or hardship.

The McCarty decision certainly had the effect of overruling past precedent and the decision contains no indication that this Court intended it to apply retroactively. The inequity and hardship which would result from retroactive application is likewise obvious. Countless judgments which were fair and equitable at the time they were rendered would be hopelessly impaired by retroactive application, a multitude of suits to cover amounts already paid under those judgments would doubtless follow as well as virtually endless litigation in an effort to restore the balance thus

disturbed. In short, one can hardly imagine a less appropriate or equitable case for retroactivity.

The ultimate success of petitioners' constitutional challenge to FSPA seems even less assured. Petitioners rely on three cases to support their Fifth Amendment challege to FSPA: United States vs. Larionoff, 431 U.S. 864, 879, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977); Costello vs. United States, 587 F.2d 424, 427 (9th Cir. 1978), cert. den. 442 U.S. 929 (1979); and United States vs. Security Industrial Bank, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982).

However, none of the cases cited by petitioners can be said to support their constitutional claims with respect to FSPA. Those cases merely reiterate the notion that, in order to survive a Fifth Amendment challenge, retrospective legislation must be clearly intended to be retroactive, and must

serve a legitimate purpose furthered by rational means. See also Pension Benefit Guaranty Corp. vs. R.A. Gray & Co., ____ U.S. _____, ____ S.Ct. _____, 81 L.Ed.2d 601 (1984).

The legislative history of FSPA discloses a comprehensive and rational approach to the conflicting interests to be considered in resolving the problems which arose following the McCarty decision, problems which were clearly recognized by this Court in rendering the decision in McCarty:

> "We recognize that the plight of an ex-spouse of a retired service-member is often a serious one . . . Congress may well decide, as it has in the civil service and foreign service context, that more protection should be afforded a former spouse of a retired servicemember. This decision, however, is for Congress alone. We very recently have reemphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs."
>
> 453 US at pp. 235-236.

Congress responded to the invitation

of this Court in a careful and studied manner, and the resulting legislation must surely survive petitioners' Fifth Amendment challenge.

Furthermore, even if petitioners are assured of ultimate success on the merits of their claims, they have an appropriate forum in the ongoing state court enforcement actions, in which to raise their federal concerns. In addition, they will have the opportunity, ultimately, to seek review by this Court of any adverse decision.

State courts are bound by the federal Constitution and federal laws just as federal courts. This Court should not accept review of the cases below simply because petitioners are afraid that the state judges will not be faithful to their constitutional responsibilities. See Huffman vs. Pursue Ltd., supra, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).

Petitioners are both California residents with an opportunity to assert their federal defenses in the pending state divorce actions.

Therefore, the lower courts correctly concluded that petitioners' federal complaints should be dismissed and that petitioners should pursue their federal claims in the state courts.

IV. CONCLUSION

Petitioners have failed to state any grounds for this Court's review of the decisions below. No error on the part of the lower courts has been shown, nor is any significant conflict with other jurisdictions presented.

Respondent submits that the decisions of the lower court should stand, and requests that this Court deny the Petition for a Writ of Certiorari.

Dated: December 17, 1984

Respectfully submitted,

STONER, WELSH & SCHMIDT

By: _____
KATHERINE E. STONER,
Attorneys for Respondent
JOAN TURMAN

CERTIFICATE OF SERVICE

I, KATHERINE E. STONER, attorney for respondent JOAN TURMAN, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of December, 1984, I served copies of the foregoing Respondent's Brief in Opposition to Petition for A Writ of Certiorari on the several parties thereto, as follows:

1. On John O. Marsh, Secretary of the Army and Verne Orr, Secretary of the Air Force by depositing a copy of the document in a United States mailbox, with first class postage prepaid, addressed to G. Christopher Stoll, Esq., Assistant to the United States Attorney, 450 Golden Gate Avenue, 16th Floor, San Francisco, California 94102 and by depositing a copy of the Respondent's Brief in a United States mailbox, with first class postage prepaid, addressed to Solicitor General, Department of

Justice, Washington D.C. 20530.

2. On Albert John Fern, Jr. and Robert Louis Stirm, by depositing a copy of the Respondent's Brief in a United States mailbox, with first class postage prepaid, addressed to their counsel of record, Mattaniah Eytan, Esq., KAPLAN, RUSSIN, VECCHI, EYTAN & COLLINS, 332 Pine Street, 4th Floor, San Francisco, California 94104.

3. On Loretta F. Adams by depositing a copy of the Respondent's Brief in a United States mailbox, with first class postage prepaid, addressed to her counsel of record, Michael A. Atherton, Esq., ATHERTON & DUNN, 289 So. San Antonio Road, Suite 200, Los Altos, California 94022, and by depositing a copy of the Respondent's Brief in a United States mailbox, with first class postage prepaid, addressed to Robert K. Booth, Jr., WILSON, MORTON, ASSAF & McELLIGGOTT, 630 North San Mateo Drive,

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(3)

NO. 84-769

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ALBERT JOHN FERN, JR. AND
ROBERT LEWIS STIRM, PETITIONERS

v.

JOAN TURMAN, JOHN O. MARSH,
SECRETARY OF THE ARMY, LORETTA F. ADAMS
AND VERN ORR, SECRETARY OF THE AIR FORCE

BRIEF OF LORETTA F. ADAMS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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15

QUESTION PRESENTED

Whether or not the decision of the United States Supreme Court in McCarty v. McCarty (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 invalidates the 1974 Amended Interlocutory Decree awarding Loretta F. Adams a portion of Robert Lewis Stirm's military retirement pay as community property.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-769

Respondent Loretta F. Adams respectfully prays that the Petition for a Writ of Certiorari of Petitioner Robert Lewis Stirm to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 10, 1984, affirming an order of the district court dismissing a complaint brought by petitioner Stirm against Loretta F. Adams, his former spouse, and the Secretary of the Air Force, be denied.

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I.

STATEMENT OF FACTS

Petitioner Robert Lewis Stirm, (hereinafter called "Stirm"), entered the United States Air Force on September 18, 1953, and retired as Colonel on June 1, 1977. On February 6, 1955, while he was on active duty, Stirm married Respondent Loretta F. Stirm, (now since her remarriage known as Loretta F. Adams and hereinafter called "Adams"). After 18 years of marriage, Adams filed a petition for dissolution of marriage in the San Mateo County Superior Court. On July 22, 1974, an Amended Interlocutory Judgment was filed and on August 14, 1974, a Final Judgment of Dissolution was entered; neither judgment was appealed and both judgments therefore became final.

In dividing the community property between the parties, the Amended Interlocutory Judgment distributed 42.6899% of Stirm's retirement pay to Adams (accrued

as of September 17, 1973) and 42.6899% of Stirm's retirement pay to Stirm, in accordance with community property laws in effect at that time.

In June of 1981 your this Honorable Court ruled that federal law preempted state law, and prohibited division of a spouses's military retirement benefits upon dissolution of marriage (McCarty v. McCarty (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589). After that decision, Stirm ceased making payments as required by the Amended Interlocutory Decree of 1974.

On February 1, 1982, Adams moved the state court for an order to compel compliance with the 1974 decree. Stirm filed a petition to remove the state action to the U.S. District Court and also filed a declaratory relief action in U.S. District Court seeking a determination that the 1974 state judgment was void under the McCarty decision.

On September 3, 1982, the U.S. District

Court for the Northern District of California entered its order dismissing the declaratory relief action in that court and remanding the action back to the state court for failure to state a federal claim, other than as a defense to a claim based entirely on state law. Stirm appealed.

While the appeal was pending, Congress enacted (effective February 1, 1983) the Uniformed Services Former Spouses Protection Act, title 10 of the United States Code, Section 1408 (hereinafter called USFSPA) permitting state courts to treat retired pay as either personal or community property in accordance with state law (10 U.S.C. Section 1408(c)(i). As indicated by the opinion filed by the Ninth Circuit Court of Appeals (B-1 through B-12 of the Appendix to the petition for writ of certiorari), the judgment dismissing the complaint filed by Stirm was affirmed.

In the meantime Adams filed a new motion to compel compliance with the 1974

state judgment in the state court and on May 13, 1983, obtained an order compelling compliance with the 1974 state judgment with reference to payment by Stirm of a portion of his military retirement pay to Adams as therein provided.

As indicated previously the sole issue presented by the petition for writ of certiorari insofar as Stirm and Adams are involved is whether or not your decision in McCarty v. McCarty, supra, invalidates the 1974 Amended Interlocutory Decree awarding Adams a portion of Stirm's military retirement pay as community property. It is submitted for the reasons hereinafter indicated that McCarty does not and that the USFSPA overrules any such conclusion to the contrary.

II.

ARGUMENT

A . McCARTY DECISION NOT RETROACTIVE.

Federal Department Store, Inc. v. Moite (1981) 452 U.S. 394, 101 S.Ct. 2424, 69

L.Ed.2d 103, specifically held that a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action, and that the res judicata consequences of a final unappealed judgment on the merits are not altered by the fact that the judgment may have been wrong or may have rested on a legal principle subsequently overruled in another case.

As noted in Armstrong v. Armstrong (1983) 696 F.2d 1237 at 1238:

> "...the argument that McCarty rendered contrary state court judgments void for lack of subject matter jurisdiction was foreclosed when the United States Supreme Court dismissed the appeal of In re Marriage of Sheldon, 124 Cal.App.3d 371, 177 Cal.Rptr. 380 (1981) for want of a substantial federal question."

Accordingly, Adams believes that this Court would not apply its decision in McCarty retroactively to the 1974 state court judgment involved in the dispute between Stirm and Adams where, as here, the judgment has become final.

The latest California state court decision of record concluding that the McCarty decision does not permit collateral attack on state court judgments which became final before the effective date of that decision is In Re Marriage of Thomas (1984) 156 C.A.3d 631, 203 Cal.Rptr. 58.

B. USFSPA OVERRULES McCARTY.

On September 8, 1982, Congress enacted the Uniformed Services Former Spouses' Protection Act, effective February 1, 1983, permitting state courts to treat retired pay as either personal or community property in accordance with state law (10 U.S.C. 1408(c)(i). It is clear that Congress has now provided power to each state through USFSPA to deal with military pensions in the manner in which it had previously treated them, or chooses to treat them in the future, at least in the view of the California courts (See In Re Marriage of Sarles (1983) 143 C.A.3d 24, 191 Cal.Rptr. 514).

Thus it seems clear that even if McCarty were applicable to the 1974 state judgment in this case, the USFSPA has removed any doubt with respect to the enforcement thereof.

As this court said in McCarty (at 453 U.S. 235-236, 101 S.Ct. 2743):

> "...Congress may well decide, as it has in the Civil Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone."

III.

CONCLUSION

In view of the fact that McCarty appears to be inapplicable to the 1974 state court judgment involved, and in view of the fact that in any event Congress has legislatively determined that state law is to be applicable, the petition for writ of certiorari sought by Stirm should be denied.

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Dated: December 15, 1984.

Respectfully submitted,

WILSON, MORTON, ASSAF &
McELLIGOTT

By _____
ROBERT K. BOOTH, JR.
Attorneys for Respondent
Loretta F. Adams

CERTIFICATE OF SERVICE

I, DIANE ARCEO, certify as follows: I am a citizen of the United States and a resident of the County of San Mateo, California; that I am over the age of eighteen (18) years and not a party to the within entitled action; that my business address is 630 North San Mateo Drive, San Mateo, California; that on January 2, 1985, I served the within BRIEF OF LORETTA F. ADAMS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on the attorneys in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office box at San Mateo, California, addressed as follows:

Katherine E. Stoner, Esq. Stoner & Welsh P.O. Box 128 Pacific Grove, CA 93950	Attorneys for Respondent Turman
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I, DIANE ARCEO, certify and declare under penalty of perjury that the foregoing is true and correct. Executed on January 2, 1985, at San Mateo, California.

Diane Arceo
DIANE ARCEO

Supreme Court, U.S.
FILED
JAN 17 1985
ALEXANDER L. STEVAS

No. 84-769 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1984

ALBERT JOHN FERN, JR., ET AL., PETITIONERS

v.

JOAN TURMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-769

ALBERT JOHN FERN, JR., ET AL., PETITIONERS

v.

JOAN TURMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners, retired military officers sued in state court by their former spouses to compel compliance with state divorce decrees, removed these actions to federal district court and brought separate lawsuits asking that the state divorce decrees be declared partially invalid. The complaints were dismissed on the basis of the domestic relations exception to federal diversity jurisdiction and the failure of petitioners to state a federal claim other than as a defense to an action grounded in state law. The cases were consolidated in the court of appeals, and the dismissals were affirmed (Pet. App. B1-B7).

1. Petitioners are two retired military officers, both required by California divorce decrees to pay a percentage of their military retired pay to their former spouses.

At the time the divorce decrees became final in 1974 and 1978, military retired pay was considered to be community property and divisible. When this Court decided *McCarty* v. *McCarty*, 453 U.S. 210 (1981), holding that federal law precluded a state court from dividing military retired pay pursuant to community property laws, both petitioners stopped making retirement payments to their former wives. The wives filed motions in California state courts to compel compliance with the divorce decrees, and these actions were removed by petitioners to federal district court, pursuant to 28 U.S.C. 1442a. Petitioners also filed their own complaints in federal district court, naming their former wives and the Secretaries of the Army and Air Force as defendants. They sought a declaration that the divorce decrees were invalid to the extent they required a division of retired pay, or in the alternative, a declaration that, if the divorce decrees were valid, the Secretaries of the Army and Air Force were required to remove petitioners from the list of retired officers subject to recall to active duty. Petitioners contended that retired pay represents pay for reduced but continuing services to the military, and that it would be inequitable for the Secretaries of the Army and Air Force to recall petitioners to active duty while directing part of their pay to their former spouses. In these lawsuits, jurisdiction was premised on diversity of citizenship, 28 U.S.C. 1332, and federal question jurisdiction, 28 U.S.C. 1331.

The district courts held (Pet. App. C1-C7; *id.* at D1-D10) that there was no diversity jurisdiction under 28 U.S.C. 1332 because the cases involved domestic relations, and no federal question jurisdiction under 28 U.S.C. 1331 because the only federal claims asserted by petitioners — that federal law prohibited the division of their retired pay — were purely a defense to state law causes of action. Pet. App. D4-D10. The courts accordingly dismissed the original

actions brought by petitioners. In addition, the district courts held that removal of the actions brought by petitioners' ex-wives was improper and remanded those actions to state court.[1]

The court of appeals consolidated the cases and affirmed, holding that the district courts did not abuse their discretion by invoking the marital relations exception to diversity jurisdiction and that there was no federal question jurisdiction to support petitioners' suits against their former wives. Pet. App. B3. The court of appeals stated that there might be federal question jurisdiction to support petitioners' claims against the Secretaries of the Army and Air Force (*ibid.*), but that these claims were not ripe for a decision. Until the state court proceedings were completed, and petitioners were ordered to relinquish a portion of their retired pay, the case against the federal defendants, in the court of appeals' view, was premature. *Id.* at B4-B5.

While the appeals to the Ninth Circuit were pending, Congress enacted the Uniformed Services Former Spouses' Protection Act (FSPA), 10 U.S.C. 1408 *et seq.* This statute allows state courts to treat military retired pay either as property of a member of the armed forces "or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." See 10 U.S.C. 1408(c)(1).[2] The

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[1]As petitioners note (Pet. 5 n.2), the district courts' determinations that removal was improper, with their consequent remand of petitioners' ex-wives' actions to state court, were not appealable orders. 28 U.S.C. 1447(d). No issue regarding those determinations is before this Court. The ex-wives' actions are currently pending in state court.

[2]10 U.S.C. 1408(c)(1) provides in relevant part:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

Act became effective on February 1, 1983, although state courts are permitted to apply the statutory provisions to periods beginning after June 25, 1981. The statute's legislative history indicates that Congress intended the Act to nullify the effect of the *McCarty* decision. See H.R. Rep. 97-749, 97th Cong., 2d Sess. 49, 165-168 (1982).

2. The only issue of direct significance to the federal respondents is the court of appeals' holding that petitioners' claims against the Secretaries of the Army and Air Force are not ripe for review. Petitioners do not, however, raise this issue as one of their questions presented (see Pet. i). Nor, in their treatment of the issue in the argument section of the petition (*id.* at 50-52), do petitioners directly challenge the court of appeals' conclusion that they will have suffered no cognizable injury until and unless the state court proceedings result in a determination in their ex-wives' favor. Petitioners state simply that the claims against the federal respondents are "substantial" (*id.* at 50) and assert that the lower court's conclusion would result in "piecemeal litigation since the retired officers must separately proceed against the Secretaries if they are to have comprehensive relief" (*id.* at 51-52). These arguments, even if valid, have no relevance to the question decided by the court of appeals.[3]

In any event, the decision below regarding the claims against the federal respondents is clearly correct. Assuming, as did the court of appeals (Pet. App. B3), that there would be federal question jurisdiction over petitioners' actions to remove petitioners' names from the active duty recall roster

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[3]We do not see how allowing this suit for what may (depending on the result in state court) turn out to be an advisory opinion would avoid "piecemeal litigation." Since petitioners' ex-wives' actions have been remanded to state court and are currently in litigation there (a result not challenged in this petition (see note 1, *supra*)), to permit this action to continue in federal court would not, as petitioners suggest (Pet. 51), lead to "resolution of the dispute in one forum."

in the event petitioners were required to comply with the divorce decrees, these claims are not now ripe for review. As the court of appeals noted (*id.* at B4-B5), until the state court proceedings are completed, and a decision is rendered ordering petitioners to give up a portion of their retired pay, any injury to petitioners is entirely speculative. *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947); cf. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967). If petitioners' arguments regarding their rights vis-a-vis their ex-wives ultimately are accepted by the California courts (or by this Court on review of the California courts' decision), there will be no need for them to pursue this action against the federal respondents.

3. Petitioners contend that the district courts were properly vested with diversity jurisdiction and federal question jurisdiction to hear their lawsuits. They assert, in essence, that judicial abstention from their cases was an abuse of discretion. We agree with respondents Turman and Adams that these contentions are without merit.

a. It is well established that federal courts do not exercise diversity jurisdiction over domestic relations claims such as those presented here. This is because "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States" (*In re Burrus*, 136 U.S. 586, 593-594 (1890)). This domestic relations exception to diversity jurisdiction has been recognized in federal jurisprudence for more than a century (see *Barber* v. *Barber*, 62 U.S. (21 How.) 582 (1858)), and is consistently applied by the federal courts. See, *e.g.*, *United States* v. *Yazell*, 382 U.S. 341 (1966); *Bennett* v. *Bennett*, 682 F.2d 1039 (D.C. Cir. 1982); *Cole* v. *Cole*, 633 F.2d 1083 (4th Cir. 1980); *Sutter* v. *Pitts*, 639 F.2d 842 (1st Cir. 1981); *Phillips, Nizer, Benjamin, Krim & Ballon* v. *Rosenstiel*, 490 F.2d 509 (2d Cir. 1973).

The Uniformed Services Former Spouses Protection Act makes states the final arbiters of how military retirement benefits are to be treated when there has been a final divorce decree. See 10 U.S.C. 1408(c). By making the division of retired pay a question of state rather than federal law, Congress evinced its view that the division of such pay involves local problems, peculiarly suited to state regulation and control. This is the very circumstance in which the domestic relations exception to diversity jurisdiction is traditionally invoked. Thus, petitioners' contention that the state court divorce decrees are void is one that should properly be heard in state court, with review by this Court for errors of federal law. Cf. *United States* v. *Morton*, No. 83-916 (June 19, 1984).

Petitioners contend (Pet. 32-33) that the instant case conflicts with *Erspan* v. *Badgett*, 647 F.2d 550 (5th Cir. 1981), cert. denied, 455 U.S. 945 (1982). However, *Erspan* was an action to enforce the terms of a final state divorce decree after the husband had declared bankruptcy; the Fifth Circuit upheld federal jurisdiction because the principal issue concerned bankruptcy law, the divorce decree was regarded as nothing more than a contract to pay money, and there was no pending state court action. See 647 F.2d at 553. By contrast, petitioners here do not seek execution of a state court judgment; they collaterally attack that judgment in federal court at a time when the very issues in dispute are being litigated in state court. Given these circumstances, the domestic relations exception to diversity jurisdiction clearly applies. See generally 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3609 (1975).[4]

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[4]Petitioners also contend (Pet. 26-30) that the courts of appeals have adopted different approaches to the domestic relations exception to diversity jurisdiction, characterizing the position of the Third and Ninth Circuits as "maximalist" (Pet. 26) and that of the Fifth Circuit as "narrower" (*id.* at 28). Whatever may be the abstract merit of these

b. Nor did the court of appeals err by failing to find federal question jurisdiction.[5] A case does not arise under federal law within 28 U.S.C. 1331 when the federal question is only an anticipated defense to a state law cause of action. *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, No. 82-695 (June 24, 1983), slip op. 7-9; *Gully* v. *First National Bank in Meridian*, 299 U.S. 109 (1936); see *Armstrong* v. *Armstrong*, 696 F.2d 1237 (9th Cir. 1983), cert. denied, No. 82-2139 (Oct. 31, 1983). Here, petitioners' claim that federal law bars division of their retirement payments is plainly a defense to the claims of their ex-wives for payments pursuant to the state divorce decrees. The actions therefore do not arise under the laws of the United States for purposes of federal question jurisdiction. See *Armstrong* v. *Armstrong, supra*.[6]

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generalizations, they do not create a conflict with respect to this case. The decision below concerns a dispute falling within the core of the domestic relations exception.

[5]Contrary to petitioners' assertion (Pet. 31), the court of appeals did not apply the domestic relations exception to the issue of federal question jurisdiction. Nor did the court invoke the abstention doctrines of *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941), or *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). Petitioners' argument concerning those doctrines (Pet. 44-48) is therefore irrelevant.

[6]In any event, the district court did not abuse its discretion to decline to adjudicate a declaratory judgment action under these circumstances. As one commentator has observed, "[t]he fact that another action, involving substantially the same issue, is pending in a state or federal court is a potent factor in the discretionary refusal to assume jurisdiction [over a declaratory judgment action]." 6A *Moore's Federal Practice* ¶ 57.08[3], at 57-44 (1983).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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